(25,417)

20192

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 587.

UNITED STATES GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE TOWN OF OAK CREEK.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

INDEX.

	Original.	Print
Petition for writ of error	1	1
Assignment of errors	1	1
Order allowing writ of error	5	3
Writ of error	7	3
Citation and service	10	4
Bond on writ of error	12	5
Certificate of lodgment	16	7
Praecipe for record	18	7
Proof of service of summons	21	8
Summons	22	9
Complaint	22	9
Exhibit A—Protest	26	16
Exhibit B—Claim	40	18
Answer	48	20
Stipulation of facts	61	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. AUGUST 7, 1916.

		Original.	Print
Exhibit	2—Letter of Tax Commission to Glue Co., October 15, 1912	63	29
	3—Letter of Glue Co. to Tax Commission, October 24, 1912	65	29
	4—Letter of Tax Commission to Glue Co., October 29, 1912	66	30
	5—Letter of Glue Co. to Tax Commission, November 4, 1912	67	30
	6—Letter of Tax Commission to Glue Co., November 7, 1912	68	30
	7—Letter of Tax Commission to Glue Co., August 5, 1913	69	31
	8—Letter of Tax Commission to Glue Co., August 7, 1913	71	32
	9—Letter of Tax Commission to Glue Co., August 23, 1913	72	33
	10—Letter of Tax Commission to Glue Co., September 22, 1913	74	34
	11—Letter of Glue Co. to Tax Commission, September 25, 1913	75	34
	12—Letter of Glue Co. to Tax Commission, October 3, 1913	76	34
	13—Letter of Tax Commission to Glue Co., October 10, 1913	77	35
	14—Letter of Glue Co. to Tax Commission, October 16, 1913	80	36
	1—Income tax return of Glue Co., 1911	81	36
Findings of fact		86	37
Conclusions of law		88	37
Judgment		89	38
Opinion of supreme court of Wisconsin		91	39
Remittitur from supreme court of Wisconsin		105	46
Judgment on remittitur		106	47
Clerk's certificate		106	48

1 Filed Jun- 17, 1916. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff and Petitioner,
v.
TOWN OF OAK CREEK, Defendant.

Considering itself aggrieved by the final judgment and decision of the circuit court of Milwaukee County, in the state of Wisconsin, dismissing the plaintiff's complaint with costs rendered and entered on the 4th day of March, 1916, in obedience to the mandate and decision of the supreme court of the state of Wisconsin in said cause rendered on the 16th day of June, 1915, the above named plaintiff and petitioner, United States Glue Company, hereby prays a writ of error from the said decision and judgment of the circuit court of Milwaukee County to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

And the said United States Glue Company assigns the following errors in the records and proceedings of the said case.

1. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in reversing, vacating and setting aside the judgment entered in the above entitled action in the said circuit court of Milwaukee County on the 8th day of February, 1915, in favor of said plaintiff, United States Glue Company, and
2 against said defendant, Town of Oak Creek.

2. The said supreme court of the state of Wisconsin erred in ordering and directing the said circuit court of Milwaukee County to enter judgment in said action in favor of said defendant, Town of Oak Creek, and against said plaintiff, United States Glue Company, dismissing the complaint of said plaintiff in said action and for costs.

3. The said circuit court of Milwaukee County erred in entering said judgment dated March 4, 1916, in favor of the defendant, Town of Oak Creek, and against the plaintiff, United States Glue Company, dismissing the plaintiff's complaint in said action with costs.

4. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and imposed by subdivision 3 of section 1087*m*-2, Wisconsin Statutes of 1911, upon the income of persons engaged in business within and without the state of Wisconsin, in so far as such income is derived from interstate commerce, does not constitute an unlawful burden upon or regulation of interstate commerce, and that said subdivision 3 of section 1087*m*-2, Wisconsin Statutes of 1911, as respects income derived from interstate commerce, does not con-

travene the provisions of section 8 of Article I of the constitution of the United States.

5. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and imposed by the taxing authorities of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $65,103.26, which was derived and received by the plaintiff, United States Glue Company, upon the sale of goods manufactured by the plaintiff within
3 the state of Wisconsin and sold by plaintiff to purchasers or customers outside of the state of Wisconsin and shipped to said purchasers or customers by said United States Glue Company from its factory in said state of Wisconsin was not a burden upon or regulation of interstate commerce and did not contravene the provisions of section 8 of Article I of the constitution of the United States.

6. The supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and imposed by the taxing authorities of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $65,103.26, which was derived and received by the plaintiff, United States Glue Company, upon the sale of goods manufactured by the plaintiff within the state of Wisconsin and sold by plaintiff to purchasers or customers outside of the state of Wisconsin and shipped to said purchasers or customers by said United States Glue Company from its factory in said state of Wisconsin did not deprive the plaintiff of its property without due process of law and did not deny to the plaintiff the equal protection of the laws contrary to the provisions of the XIVth amendment to the constitution of the United States.

7. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and assessed by the taxing officers of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $31,336.86, which was derived and received by the plaintiff, United States Glue Company, from the sale of goods manufactured by the plaintiff within the state of Wisconsin and shipped by the plaintiff to branch houses or depots maintained by the plaintiff in states other than Wisconsin and
4 thence sold by the plaintiff and shipped to purchasers or customers outside of the state of Wisconsin was not a burden upon or regulation of interstate commerce and did not contravene the provisions of section 8 of Article I of the constitution of the United States.

8. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and assessed by the taxing officers of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $31,336.86, which was derived and received by the plaintiff, United States Glue Company, from the sale of goods manufactured by the plaintiff within the state of Wisconsin

and shipped by the plaintiff to branch houses or depots maintained by the plaintiff in states other than Wisconsin and thence sold by the plaintiff and shipped to purchasers or customers outside the state of Wisconsin did not deprive the plaintiff of its property without due process of law, and did not deny to the plaintiff the equal protection of the laws, contrary to the provisions of the XIVth amendment to the constitution of the United States.

For which errors the plaintiff, United States Glue Company, prays that the said judgment of the circuit court of Milwaukee County in the state of Wisconsin dated March 4, 1916, be reversed, and a judgment rendered in favor of the plaintiff, United States Glue Company, and for costs.

Dated June 15th, 1916.

GEO. LINES,
WILLETT M. SPOONER,
FRED C. ELLIS,
LOUIS QUARLES,
LINES, SPOONER, ELLIS & QUARLES,
Attorneys for United States Glue Company.

STATE OF WISCONSIN,
Supreme Court, ss:

Let the writ of error issue as prayed in the foregoing petition upon the execution of a bond by the United States Glue Company to the Town of Oak Creek in the sum of five hundred dollars, such bond when approved to act as a supersedeas.

Dated June 21st, 1916.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

6 [Endorsed:] 40831. State of Wisconsin. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff & Petitioner, v. Town of Oak Creek, Defendant. Petition for Writ of Error, Assignment of Errors, and Prayer. Copy. Lines, Spooner, Ellis & Quarles, Pabst Building, Milwaukee, Wis. Filed Jun- 27, 1916. C. C. Mass, Clerk.

7 Filed Jun- 27, 1916. C. C. Mass, Clerk.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Circuit Court of Milwaukee County, in the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between

United States Glue Company, plaintiff, and town of Oak Creek, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of such their validity, or wherein there was drawn in question the construction of a clause of the constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said United States Glue Company as by its complaint appears, we, being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with
8 all things concerning the same to the supreme court of the United States, together with this writ so that you have the same in the said supreme court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the United States, the 26th day of June, in the year of our Lord, one thousand nine hundred sixteen.

[Seal U. S. District Court, Eastern District Wisconsin.]

F. C. WESTFAHL, Jr.,
Clerk District Court of the United States
for the Eastern District of Wisconsin.

Allowed June 21st, 1916.
JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

9 [Endorsed:] 40831. State of Wisconsin. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff and Petitioner, vs. Town of Oak Creek, Defendant. Writ. Original. Lines, Spooner, Ellis & Quarles, Pabst Building, Milwaukee, Wis. Filed Jun- 27, 1916. C. C. Maas, Clerk.

10 Filed Jun- 27, 1916. C. C. Maas, Clerk.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Town of Oak Creek, in the County of Milwaukee and State of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear at and before the supreme court of the United States at Washington, D. C.,

within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the circuit court of Milwaukee County, Wisconsin, wherein United States Glue Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the supreme court of the State of Wisconsin this 21st day of June, 1916.

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk Supreme Court of Wisconsin.

11 [Endorsed:] 40831. State of Wisconsin. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff & Petitioner, v. Town of Oak Creek, Defendant Citation. Original. Lines, Spooner, Ellis & Quarles, Pabst Building, Milwaukee, Wis. Filed Jun- 27, 1916. C. C. Maas, Clerk.

Service of the within citation admitted this 27 day of June, 1916.

H. J. KILLILEA,
Attorney for Defendant in Error.

12 Filed Jun- 27, 1916. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

Know all men by these presents, that we, United States Glue Company, as principal, and Fred Vogel, Jr., and Charles F. Pfister, as sureties, are held and firmly bound unto the town of Oak Creek, in the county of Milwaukee, and state of Wisconsin, in the sum of five hundred dollars, to be paid to the said town, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1916.

[SEAL.]

Whereas, the above named United States Glue Company seeks to prosecute its writ of error to the United States Supreme Court

to reverse the judgment rendered and entered in the above entitled action by the circuit court of Milwaukee County on the 4th day of March, 1916, in obedience to the decision of the supreme court of the state of Wisconsin in said cause rendered on the 16th day of June, 1915, and the mandate in pursuance thereof issued by the said supreme court of Wisconsin to the said circuit court of Milwaukee County,

13 Now, therefore, the condition of this obligation is such that if the above named United States Glue Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

UNITED STATES GLUE COMPANY,
By FRED VOGEL, Jr., *President.*

Attest:
W. G. HANSON, *Secretary.*

FRED VOGEL, Jr.
CHAS. F. PFISTER. [SEAL.]

STATE OF WISCONSIN,
Milwaukee County, ss:

Fred Vogel, Jr., and Chas. F. Pfister being each duly sworn, on oath deposes and says each for himself: That he is of lawful age and a citizen of the state of Wisconsin, and knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

FRED VOGEL, Jr.
CHAS. F. PFISTER.

Subscribed & Sworn to before me this 15th day of June, 1916.
[NOTARIAL SEAL.] JAMES E. MOORE,
Notary Public, Wisconsin.

My commission expires Jan. 28, 1917.

14 Bond approved and to operate as a supersedeas. Dated June 21st, 1916.

JNO. B. WINSLOW,
Chief Justice, Supreme Court of Wisconsin.

15 [Endorsed:] 40631. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Bond. Copy. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed Jun- 27, 1916. C. C. Maas, Clerk.

16 Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, C. C. Maas, clerk of said court, do hereby certify that there was lodged with me as such clerk on June 27, 1916, in the matter of United States Glue Company, plaintiff, against town of Oak Creek, defendant:

1. The original bond, a copy of which is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for the defendant, and one to file at my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Milwaukee, Wisconsin, this 20th day of July, 1916.

[Seal Circuit Court Milwaukee Co., Wisconsin.]

C. C. MAAS,
Clerk Circuit Court of Milwaukee County, Wisconsin.
By CHAS. SCHERER,
Deputy Clerk.

17 [Endorsed:] 40831. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Certificate of Lodgment of Writ. Original. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed Jul- 20, 1916. C. C. Maas, Clerk.

18 Filed Jul- 20, 1916. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant

To C. C. Maas, Clerk of the Circuit Court of Milwaukee County, Wisconsin:

The portions of the record in the above entitled case to be incorporated into the transcript of the record to be sent to the clerk of the United States Supreme Court by virtue of a writ of error heretofore issued are indicated as follows:

1. Petition for writ of error, assignment of error, prayer for reversal, and order granting writ of error.
2. Writ of error.

3. Citation and proof of service.
4. Bond on writ of error.
5. Clerk's certificate as to lodgment.
6. Precipe for record.
7. Summons and proof of service.
8. Complaint.
9. Amended answer.
10. Stipulation of facts.
11. Findings of fact and conclusions of law.
12. First judgment of circuit court.
13. Opinion and mandate of supreme court of Wisconsin.
14. Final judgment of circuit court.

Dated Milwaukee, Wisconsin, July 20th, 1916.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff in Error.

[Endorsed:] 40831. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Precipe for Record. Original. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed Jul- 20, 1916. C. C. Maas, Clerk.

STATE OF WISCONSIN,
Milwaukee County, ss:

Docket #6410; C. B. I. #253.

Filed Aug. 5, 1913. C. C. Maas, Clerk.

I hereby certify that at the Town of Oak Creek, Milwaukee County, State of Wisconsin, on the 24th day of July A. D. 1913, I served the annexed Summons and Complaint upon the within named defendant, Town of Oak Creek, by then and there delivering to and leaving with Louis H. Goelzer, personally, Town Clerk of aforesaid town of Oak Creek, and whom I know to be such person and official, true copies thereof.

I further certify that at the city of Milwaukee, in said county and state, on the 30th day of July, A. D. 1913, I served the annexed Summons and Complaint upon the within named defendant, Town of Oak Creek, by then and there delivering to and leaving with Luke Scanlan personally, town Chairman of aforesaid Town of Oak Creek, and whom I know to be such person and official, true copies thereof; and at the time of said services I endorsed the date of service, my name and official title on copies so served.

LAWRENCE McGREAL, *Sheriff*,
Per GEORGE PAZIK, *Deputy Sheriff*.

Service	$1.00
Travel	2.80
Folio	12.40
Total	16.20

Filed Apr. 20, 1915. Clarence Kellogg, Clerk of Supreme Court, Wis.

22 Filed Aug. 5, 1913. C. C. Maas, Clerk.

In Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

The State of Wisconsin to the said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

LINES, SPOONER, ELLIS & QUARLES,
Plaintiff's Attorneys.

Post Office address: 711 Pabst Building, Milwaukee, Milwaukee County, Wisconsin.

23 Filed Aug. 5, 1913. C. C. Maas, Clerk.

In Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY. Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

The above named plaintiff, by Lines, Spooner, Ellis & Quarles, its attorneys, for complaint against the above named defendant, respectfully shows to the court and for a first cause of action alleges:

1. That at all of the times hereinafter mentioned plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, with its principal office and place of business in the town of Oak Creek, in the county of Milwaukee, in said state of Wisconsin, and was and is the owner of an extensive manufacturing plant in said town and was and is engaged in the business of manufacturing glue, gelatin, grease and other products and selling the same throughout the state of Wisconsin and in other states of the United States of America and in foreign countries; that during all of said times the said defendant town of Oak Creek was and still is a duly organized, incorporated and existing town in the county of Milwaukee and state of Wisconsin.

2. That during the year 1912 the plaintiff was the owner
24 and in possession of goods and chattels and other personal property within the state of Wisconsin, subject to assessment for taxation in said state and which were duly assessed for taxation in said state in the said year 1912, and that pursuant to such assess-

ment taxes were levied thereon for said year 1912 to the amount of $1159.18, which said taxes were paid by said plaintiff on or about the 29th day of January, 1913.

3. Plaintiff further alleges that within the time fixed and allowed by chapter 658 of the laws of Wisconsin for the year 1911, otherwise known as sections 1087m-1 to 1087m-30 of the Wisconsin statutes, commonly and hereinafter called "the income tax law," plaintiff duly furnished to and filed with the tax commission of the state of Wisconsin, hereinafter called "the tax commission," a true and accurate statement and return of the income received by plaintiff during the year ending December 31, 1911, which said statement and return was duly verified by the oath of plaintiff's president and treasurer, and contained and set forth all facts required by the said income tax law and the requirements and regulations of the said tax commission, and was made in the manner and form required and prescribed by said income tax law and the regulations of said tax commission pursuant thereto, and that plaintiff in all respects in due time, manner and form complied with all of the provisions of said income tax law and all of the orders, requests and regulations of said tax commission relative to such statement and return;

That plaintiff's said verified statement and return was and is true and correct in every particular and showed, as the fact is, that the total net income of the plaintiff for the year 1911 subject to taxation under said income tax law computed according to the rules prescribed in said income tax law and by said tax commission was the sum of $58,990.64, and no more; and said statement and return further showed as the fact is that the net income of the plaintiff for said year subject to taxation under said income tax law computed according to the rules prescribed in said income tax law exceeded twelve per cent of the assessed value of the property of the plaintiff used and employed in the acquisition of said income; that under the provisions of said income tax law the aforesaid net taxable income of the plaintiff for said year was subject to a tax at the rate of six per cent, and that said tax would amount to the sum of $3,539.44.

4. That thereafter and on or about the 15th day of October, 1912, the said tax commission acting under and pursuant to the said income tax law in form made an assessment of the net taxable income of this plaintiff and then and there in form assessed the same at the sum of $66,576.00, and then and there in form computed, assessed and levied upon the plaintiff a tax upon its said income as so fixed and assessed by said tax commission at the rate of six per cent, amounting to the sum of $3,994.56;

That thereafter the said tax commission certified to the county clerk of Milwaukee County a statement of the aforesaid assessment of the plaintiff upon its income for the year 1911 and of the tax thereon so in form assessed, computed and levied by said tax commission and thereafter the said county clerk of Milwaukee County certified the said assessment and tax to the town clerk of the defendant town of Oak Creek and said assessment and tax were placed upon the tax roll of said town for the year 1912 and said tax roll was delivered to the town treasurer of said town,

together with a warrant for the collection of the taxes thereon shown, including said tax against the plaintiff, at the time and in the manner provided by law.

5. Plaintiff further alleges that no notice was given to the plaintiff by said tax commission of any hearing by or before said tax commission for the purpose of considering, determining and assessing the amount of plaintiff's taxable income for the year 1911, and upon information and belief plaintiff alleges that no hearing was had by or before said tax commission in respect of plaintiff's taxable income for said year and that no evidence was presented or submitted to said tax commission in respect of plaintiff's said income other than the sworn statement and return so as aforesaid furnished and filed by the plaintiff.

Plaintiff further alleges that the assessment of plaintiff upon its income for the year 1911 so as aforesaid made by said tax commission was so made without any notice to the plaintiff and without any opportunity being afforded to the plaintiff to appear before said tax commission and submit evidence in regard to its said income; that as plaintiff is informed and believes no evidence was submitted to said tax commission in regard to plaintiff's said income except the aforesaid sworn statement and return furnished and filed by the plaintiff.

Plaintiff further alleges that by reason of the assessment of the plaintiff's income for the year 1911 at the sum of $66,576.00 as aforesaid, instead of at the sum of $58,990.64 as shown by plaintiff's said statement and return the tax upon the income of
27 the plaintiff for the year 1911 was unjustly and unlawfully increased by the sum of $455.12.

6. Plaintiff further alleges that on or about the 29th day of January, 1913, the treasurer of said town of Oak Creek then having the said tax roll and tax warrant demanded of this plaintiff the payment of said income tax so assessed and levied against the plaintiff on account of the income by it received for the year ending December 31, 1911, amounting to said sum of $3,994.56, which said sum and the whole and every part thereof plaintiff then and there refused to pay; that said treasurer of said town of Oak Creek thereafter and on the same date, to-wit: January 29, 1913, again demanded payment of said income tax and thereupon threatened to seize and sell under and by virtue of the said warrant the goods and chattels of the plaintiff unless plaintiff complied with the said demand and paid said tax; that plaintiff was then the owner and in possession of goods and chattels within said town of Oak Creek subject to seizure and sale for payment of taxes sufficient in amount and value to pay the said tax so demanded by said town treasurer; that thereupon plaintiff because of said demands and under duress of said threats presented to said treasurer of the town of Oak Creek on said date and at said town the receipt for taxes theretofore paid by plaintiff on its personal property for the year 1912, said taxes so amounting as aforesaid to the sum of $1,159.18, and at the same time and place paid to said town treasurer the balance of said income tax so demanded by him, to-wit: the sum of $2,835.38; that

said payment and the whole thereof was made under writ-
28 ten protest and objection delivered to the said town treasurer at said time and place, a copy of which said protest and objection is hereto attached marked Exhibit A. and made a part hereof.

7. Plaintiff further alleges that in and by the aforesaid assessment, levy and collection of said income tax substantial injustice was done to this plaintiff and that this plaintiff was deprived of its property without due process of law, and denied the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

8. That on the 18th day of March, 1913, plaintiff duly filed with the town clerk of said defendant town of Oak Creek in manner and form provided by law a statement or bill of the aforesaid unlawful taxes so as aforesaid paid by the plaintiff; that said statement or bill was so filed with the said town clerk to be laid before the town board of audit of said defendant town of Oak Creek; that the next annual meeting of said town, after the filing of said statement or bill was held on the first Tuesday of April, 1913; that said town of Oak Creek and the town board of audit thereof refused to allow or pay the plaintiff's said claim, but disallowed the whole and every part thereof; that plaintiff's said claim has not been paid nor any part thereof and that more than ten days has elapsed since said annual town meeting; that a copy of the aforesaid statement or bill of plaintiff's said claim is hereunto annexed marked Exhibit B. and made a part hereof.

29 For a second and separate cause of action plaintiff alleges and shows to the court:

9. Plaintiff repeats and realleges as part of this its second cause of action all of the allegations, matters and things stated and set forth in paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of the first cause of action stated and set forth in this complaint, and prays that the same may be taken and considered as though herein again set out at large.

10. Plaintiff further alleges that said income tax law and particularly section 1087m-2, subdivision 3 thereof, provides that the income subject to taxation thereunder of persons or corporations engaged in business both within and without the state of Wisconsin other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be ascertained and computed by taking the gross business in dollars of such person or corporation within said state and adding to the same the full value in dollars of the property of such person or corporation located in said state, the sum so obtained to constitute the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of such person or corporation both within and without said state added to the full value in dollars of the entire property of such person or corporation both within and without said state, and that the fraction so obtained shall be taken to represent the proportion of the total net income of such person or corporation derived from business transacted and property located within said state

other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, and plaintiff alleges that in assessing plaintiff's income for the year 1911 for taxation as aforesaid the tax commission intended and attempted to follow, adopt and
30 apply the aforesaid rule and direction of said income tax law.

Plaintiff further alleges that the gross business in dollars of the plaintiff within the state of Wisconsin in and for the year 1911 amounted to $165,223.38; that the full value of the property of the plaintiff within said state in said year was the sum of $753,181.61; that the gross business in dollars transacted by the plaintiff in said year 1911 both within and without the said state was the sum of $1,279,850.77; that the full value in dollars of the entire property of the plaintiff in the year 1911 both within and without the said state was the sum of $1,060,900.00; that the total net income of the plaintiff for the year 1911 after making the deductions allowed by said income tax law and as computed by the plaintiff other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness was the sum of $123,884.34; that said total net income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness as computed by said tax commission was the sum of $143,884.34; that the total income of the plaintiff for the year 1911 from rentals, stocks, bonds, securities or evidences of indebtedness was the sum of $10,390.81, and that in assessing plaintiff's income subject to taxation under said income tax law said tax commission intended and attempted to follow, adopt and apply the aforesaid rule and direction prescribed in said income tax law and in said attempted compliance therewith assessed the net income of the plaintiff for the year 1911 subject to taxation under said income tax law other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness at the sum of $56,-
185.19 and assessed the income of the plaintiff for said year
31 derived from rentals, stocks, bonds, securities or evidences of indebtedness at the sum of $10,390.81 and assessed the total net income of the plaintiff for said year subject to tax under said income tax law at the sum of $66,576.00, and said last mentioned sum being more than twelve per cent of the assessed value of the property of the plaintiff used and employed in the acquisition of said taxable net income as so assessed the said tax commission assessed and levied a tax thereon at the rate of six per cent, amounting as aforesaid to the sum of $3,994.56.

Plaintiff further alleges that of the aforesaid sum of $66,576.00 of net income of this plaintiff for the year 1911 so as aforesaid assessed by said tax commission as subject to tax under said income tax law the sum of $10,390.81. was income received by this plaintiff from rentals, stocks, bonds, securities or evidences of indebtedness and the sum of $17,220.66 and no more was income derived by the plaintiff from sources within the state of Wisconsin consisting of business transacted and sales made wholly within said state and the sum of $38,964.53 was income received by the plaintiff from and produced by business transacted and sales made by the

plaintiff in the course of commerce between the state of Wisconsin and other states of the United States and with foreign countries and that of the said sum of $3,994.56 assessed and levied by the said tax commission as the tax payable by this plaintiff upon its net income for the year 1911 the sum of $623.45 was a tax upon the income received by the plaintiff for said year from rentals, stocks, bonds, securities or evidences of indebtedness and the sum of $1,083.24 was a tax upon the income received by this plaintiff in said year from sources within the state of Wisconsin and the sum of $2,337.87 was a tax upon income received by this plaintiff in said year from business constituting commerce between the state of Wisconsin and other states of the United States and with foreign countries.

11. Plaintiff further alleges that in and by the assessment, levy and collection of the said sum of $2,337.87, part and parcel of the aforesaid tax of $3,994.56 so as aforesaid assessed and levied upon the income of this plaintiff for the year 1911 and paid by this plaintiff as hereinbefore alleged a substantial injustice was done to this plaintiff and that in and by the assessment, levy and collection of the said sum of $2,337.87 there was assessed, levied and collected a tax upon the business and commerce transacted by the plaintiff between the several states of the United States and with foreign countries contrary to the provisions of section 8 of article 1 of the constitution of the United States, and that in and by the assessment, levy and collection of the aforesaid tax this plaintiff was deprived of its property without due process of law and was denied the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

And this plaintiff further alleges, especially sets up and claims that the aforesaid provisions of the said income tax law respecting the assessment of the income of persons or corporations engaged in business both within and without the state of Wisconsin and the levy of a tax thereon are unconstitutional, null and void and contravene that portion of section 8 of article 1 of the constitution of the United States which grants to the congress power to regulate commerce with foreign nations and among the several states, and the provisions of the 14th amendment to the constitution of the United States which declare that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

For a third and separate cause of action plaintiff alleges and shows to the court:

12. Plaintiff repeats and realleges as part of this its third cause of action all of the allegations, matters and things stated and set forth in paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of the first cause of action and of paragraphs 10 and 11 of the second cause of action stated and set forth in this complaint, and prays that the same may be taken and considered as through herein again set out at large.

13. This plaintiff further alleges that the total net income of this

plaintiff for the year 1911 from rentals, stocks, bonds, securities or evidences of indebtedness and from all other sources within the state of Wisconsin was the sum of $27,611.47, and that the same was the total net income of the plaintiff subject to taxation under said income tax law; that the assessed value of the property of the plaintiff used and employed in the acquisition of the said taxable net income was the sum of $341,950.00; that the said taxable net income of the plaintiff for the year 1911 equalled eight and one-tenth plus per cent of the assessed value of the property of the plaintiff used and employed in the acquisition of such income; that under said income tax law the said net income was subject to taxation at the rate of four and one-half per cent only, and that the tax which should have been assessed upon the plaintiff's said net taxable income is the sum of $1,242.52.

34 Plaintiff further alleges that by reason of the unjust, inequitable and unconstitutional rule prescribed by the said income tax law as aforesaid, which rule was followed, adopted and applied by the said tax commission as aforesaid in the assessment of the plaintiff's net income for the year 1911 subject to taxation under said income tax law and in the levy of a tax thereon the tax upon plaintiff's income for the year 1911 was unjustly, unlawfully and unconstitutionally increased by the sum of $414.16.

Wherefore, the plaintiff prays judgment against the defendant for the sum of two thousand, eight hundred thirty-five and 38/100 (2,835.38) dollars, with interest thereon from the 29th day of January, 1913, together with the costs and disbursements of this action.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Fred Vogel, Jr., being first duly sworn on oath says that the above named plaintiff is a corporation; that he is an officer thereof, to-wit: the President thereof, and makes this affidavit on behalf of said plaintiff, being duly authorized so to do; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters
35 therein stated upon information and belief, and as to those matters he believes it to be true.

FRED VOGEL, Jr.

Subscribed & Sworn to before me this 24th day of July, 1913.

[SEAL.] JAMES E. MOORE,
Notary Public, Wisconsin.

My commission expires Jan. 28, 1917.

36 EXHIBIT A.

Herman Teenow, Treasurer of the Town of Oak Creek.

DEAR SIR: The United States Glue Company herewith pays you thirty-nine hundred ninety-four and 56/100 dollars ($3994.56) which is the amount demanded by you from said company in payment of tax in form assessed against said company by the taxing officer of the state of Wisconsin, under and pursuant to provisions of chapter 658, laws of 1911, as and for the tax upon its income received during the year ending December 31, 1911.

You are hereby notified that payment of this said tax in the amount of thirty-nine hundred ninety-four and 56/100 dollars ($3994.56) and the whole and every portion thereof, is made under protest and not voluntarily, and because of duress and threatened levy. That among the objections to said tax are the following:

1. That the said chapter 658, Laws of 1911, is unconstitutional and void and contravenes the constitution of the state of Wisconsin.

2. That the said chapter 658, laws of 1911, is unconstitutional and void and contravenes the constitution of the United States, particularly the Fourteenth Amendment thereof.

You are hereby notified that payment of four hundred fifty-five and 12/100 dollars ($455.12) in amount of said tax and the whole and every portion of said four hundred fifty-five and 12/100 dollars ($455.12) is made under protest and not voluntarily, and because of duress and threatened levy. That said tax is unjust, illegal, null, void and excessive for the following among other reasons:

That the United States Glue Company duly made and returned to the Wisconsin Tax Commission in the manner and form
37 and within the time required by law and the rules and regulations of said Wisconsin Tax Commission a return of its income for the year 1911 duly verified as required by law, which said return was true and correct in every particular and contained a true and correct statement of all matters and things required to be stated therein by law and by the rules and regulations of said Wisconsin Tax Commission; that said return showed the total taxable net income of said United States Glue Company to be the sum of fifty-eight thousand nine hundred ninety and 64/100 dollars ($58990.64) which said sum was and is the true net income of said United States Glue Company for the year 1911 subject to tax under chapter 658 of the laws of Wisconsin for the year 1911, and said return further showed that the taxable net income of said United States Glue Company exceeded 12% of the assessed value of the property of said corporation used and employed in the acquisition of such income, and that said corporation was by law required to pay a tax of six per cent (6%) upon said net taxable income, amounting to three thousand five hundred thirty-nine and 44/100 dollars ($3539.44);

That thereafter and on or about October 15, 1911, the said Wisconsin Tax Commission in form made an assessment of the net taxable income of said United States Glue Company and then and

there in form assessed the same at the sum of sixty-six thousand five hundred seventy-six dollars ($66576) and thereafter certified the said assessment to the county clerk of Milwaukee County, and said county clerk and the assessor of incomes for the county of Milwaukee computed, levied and assessed against said United States Glue Company a tax of six per cent (6%) upon said sum of sixty-six thousand five hundred seventy-six dollars ($66,576) amounting in the aggregate to three thousand nine hundred ninety-four and 56/100 dollars ($3994.56);

That said assessment of the income of said United States Glue Company for the year 1911 so as aforesaid made by said Wisconsin Tax Commission was made by said commission without any notice to said United States Glue Company as required by law; and without any opportunity to be heard being given or afforded to said United States Glue Company as required by law; and without any evidence being heard or produced by or to said Tax Commission as required by law; and was and is unjust, illegal, null and void as respects the excess of said assessment over and above the amount of taxable income stated and shown in and by the aforesaid verified return of said United States Glue Company; and that the tax so as aforesaid computed, levied and assessed upon the income of said United States Glue Company for the year 1911 is unjust, illegal, null and void to the extent of the excess of said tax over and above the sum of three thousand five hundred thirty-nine 44/100 dollars ($3,539.44), said last named sum being the tax at the rate of six per cent upon the net taxable income stated and shown in the aforesaid cerified return of said United States Glue Company and said unjust and illegal excess amounting to the sum of four hundred fifty-five and 12/100 dollars ($455.12); that the assessment, levy and collection of said unjust and illegal portion of said tax, to-wit: the sum of four hundred fifty-five and 12/100 dollars ($455.12) deprives the said United States Glue Company of its property without due process of law and denies to it the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

That suit will be commenced immediately to test the validity of said act, and for the recovering of the tax paid thereunder; or such portion thereof as may be unjustly, excessively and illegally assessed and in such suit the undersigned will rely upon all grounds which it may be advised render said tax or any portion thereof unjust, illegal or excessive, whether the same are hereinabove specified or not, and such recovery will also be sought by all means available for that purpose.

UNITED STATES GLUE COMPANY,
By WILLIAM G. HANSON,
Ass't Sec'y-Treas.

40 EXHIBIT B.

To the Town of Oak Creek, Milwaukee County, its Supervisors & Board of Audit:

The undersigned claimant, United States Glue Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin and having its principal office and place of business in the said town of Oak Creek, has and hereby presents a claim against said town for the sum of $2,835.38, which said claim arises on account of and is based upon the following facts and circumstances:

That on or about the 15th day of October, 1912, the tax commission of the state of Wisconsin assuming to act under and by virtue of the provisions of chapter 658 of the laws of Wisconsin for the year 1911, otherwise known as sections 1087*m*-1 to 1087*m*-30 of the Wisconsin Statutes, and hereinafter called "the income tax law," assessed, computed and levied a tax in the amount of $3,994.56 upon the income of the undersigned for the year 1911; that thereafter pursuant to the provisions of said income tax law the said assessment and tax was certified to the county clerk of Milwaukee County by said commission and by said county clerk certified to the town clerk of the town of Oak Creek and was placed upon the tax roll of said town for the year 1912 as a tax against the undersigned and said tax roll together with a warrant in due form of law for the collection of the taxes extended and shown thereon, including said income tax against the undersigned, was delivered to the town treasurer of said town of Oak Creek at the time and in the manner and form provided by law; that thereafter and on or about the 29th day of January, 1913, the said town treasurer then having
41 the said tax roll and warrant in his possession demanded of the undersigned payment of the said income tax of $3,994.56, which said tax the undersigned then and there refused to pay; that thereupon and on the same day the said town treasurer again demanded payment of the said tax and threatened in case the undersigned refused to pay the same that he, the said town treasurer, would seize and levy upon the goods and chattels of the undersigned and sell enough of the same to pay the said tax; that thereupon and because of said threats the undersigned presented to said town treasurer a receipt for taxes theretofore paid by it upon its personal property for the year 1912 amounting to the sum of $1,159.18 and at the same time and place paid the said town treasurer in money the balance of said income tax so demanded by him, to-wit: the sum of $2,835.38; that the payment of said sum and the whole thereof was made by the undersigned under duress and protest and at the time of paying said sum the undersigned presented to and left with said town treasurer a written protest of which a copy marked Exhibit A. is hereto attached and made part hereof; that all of the tax so paid by the undersigned in money, to-wit: the sum of $2,835.38, was assessed and levied upon income derived by the undersigned during the year 1911 from business and transactions constituting

commerce between the several states of the United States and with foreign countries.

The undersigned claims that the said income tax law and particularly section 1087m-2 subdivision 3 thereof is unconstitutional, null and void, for the reason that the same authorizes and imposes a tax upon and constitutes a regulation of commerce between the several states of the United States and with foreign countries, contrary to the provisions of section 8 of article 1 of the constitution of
42 the United States and that in and by the assessment, levy and collection of the aforesaid tax upon the income of the undersigned for the year 1911 a tax was imposed upon the commerce conducted by the undersigned between the several states of the United States and with foreign countries and the said commerce was thereby regulated and burdened, contrary to the provisions of section 8 of article 1 of the constitution of the United States, and that in and by the assessment, levy and collection of said tax the undersigned was deprived of its property without due process of law and was denied the equal protection of laws, contrary to the provisions of the 14th amendment to the constitution of the United States.

The undersigned further represents that within the time fixed and allowed by said income tax law the undersigned duly furnished to and filed with the tax commissioner of Wisconsin a true and accurate statement and return of the income received by the undersigned during the year ending December 31, 1911, which said statement was duly verified by the oath of plaintiff's president and treasurer and contained and set forth all facts required by the said income tax law and the requirements and regulations of the said tax commission pursuant thereto and that plaintiff in all respects in due time, manner and form complied with all of the provisions of said income tax law and all of the orders, requests and regulations of said tax commission relative to such statement and return, and that said verified statement and return was and is true and correct in every particular and showed as the fact is that the total net income of plaintiff for the year 1911 subject to taxation under said income tax law computed according to the rules prescribed and laid down in said income tax law was and is the su mof $58,990.64 and no more; that thereafter the said tax commission of Wisconsin assuming to act under and pursuant to the said income tax law in form-
43 assessed the net taxable income of the undersigned for the year 1911 at the sum of $66,576.00; that the said assessment was so made without any prior notice being given to the undersigned and without affording the undersigned an opportunity to be heard in respect of the assessment of its income for said year 1911 and without any hearing being had by or before said tax commission and without any evidence being presented or submitted to said tax commission, and that by reason of the said assessment of the income of the undersigned at the sum of $66,576.00 instead of $58,990.64 as shown by the said statement and return furnished and filed by the undersigned, the tax upon the income of the undersigned for the year 1911 as computed, assessed and levied by said tax commission was

increased by the sum of $455.12, and the undersigned claims that in and by the assessment, levy and collection of the said tax upon the income of the undersigned for the year 1911 to the extent and amount of the said increase, to-wit: the sum of $455.12, the undersigned was deprived of its property without due process of law and was denied the equal protection of the laws, contrary to the provisions of the 14th amendment to the constitution of the United States and contrary to the provisions of the constitution of the state of Wisconsin.

Wherefore, the undersigned claims payment from the said town of Oak Creek of the aforesaid sum of twenty-eight hundred thirty-five and 38/100 (2835.38) dollars.

Dated March 15, 1913.

UNITED STATES GLUE COMPANY,
By C. ANSTEDT, Jr., *Sec'y.*

44 STATE OF WISCONSIN,
Milwaukee County, ss:

C. Anstedt, Jr., being first duly sworn, says that he is an officer of the above named claimant, to-wit: the Secretary thereof, and makes this verification in its behalf; that he has read the foregoing statement of claim and that the same is true to the best of his knowledge and belief.

C. ANSTEDT, Jr.

Subscribed & sworn to before me this 15th day of March, 1913.
[SEAL.] CHAS. B. QUARLES,
Notary Public, Wisconsin.

My commission expires July 4, 1915.

45 [Endorsed:] Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Summons and Complaint. Copy. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed Aug. 5, 1913. C. C. Maas, Clerk.

46 Filed Sep. 21, 1914. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
vs.
TOWN OF OAK CREEK, Defendant.

The defendant above named by amended answer to plaintiff's complaint admits, denies and alleges as follows:

Defendant admits:

1. That the plaintiff was and is a corporation organized under the laws of the State of Wisconsin, as alleged in complaint;

2. That the plaintiff is the owner of an extensive manufacturing plant located in the Town of Oak Creek and is engaged at said place in the business of manufacturing glue, gelatin, grease and other products and selling the same throughout the State of Wisconsin and in other states of the United States and in foreign countries;

3. That during the times mentioned in complaint the defendant was, and still is, a duly organized, incorporated and existing town in the County of Milwaukee and State of Wisconsin;

4. That during the year 1912 the plaintiff was the owner and in possession of goods, chattels and other personal property within the State of Wisconsin, subject to assessment for taxation, and which property was duly assessed for taxation in said State for the year 1912, and that pursuant to such assessment taxes were levied thereon for said year to the amount of One Thousand One Hundred Fifty-nine and 18/100 ($1,159.18) Dollars, which tax was paid by plaintiff;

47 5. That on or about the 29th day of January, 1913, the defendant demanded, received and collected of the plaintiff as and for income tax upon the taxable income of the plaintiff for the year 1911 the sum of Three Thousand Nine Hundred Ninety-four and 56/100 ($3,994.56) Dollars, the same being paid by the plaintiff to the defendant as follows: Defendant accepted the receipt of One Thousand One Hundred Fifty-nine and 18/100 ($1,159.18) Dollars paid for personal taxes as payment of said income tax for that amount, and in addition collected from the plaintiff the sum of Two Thousand Eight Hundred Thirty-five and 38/100 ($2,835.38) Dollars;

6. That said income tax was paid by plaintiff under protest, as alleged in the complaint;

7. That plaintiff thereafter demanded repayment of said sum from said defendant on the ground that the same had been unlawfully received and collected.

Further answering, the defendant, on information and belief, alleges that the amount, Three Thousand Nine Hundred Ninety-four and 56/100 ($3,994.56) Dollars, assessed against said plaintiff by way of income tax, was duly ascertained, determined and assessed by the Wisconsin State Tax Commission pursuant to and in conformity with the provisions of Chapter 658 of the Laws of 1911, and that the amount of said income tax so ascertained, determined, levied and assessed against and paid by the plaintiff herein as aforesaid, and was in no manner or respect more than the plaintiff was lawfully bound to pay therefor under the provisions of said Chapter 658 of the Laws of 1911.

The defendant, on information and belief, alleges that the plaintiff's taxable income for said year was in excess of eleven per cent (11%) of the total assessed value of its property used and employed by it in the earning and acquisition of said income,

48 and that the rate of taxation at which plaintiff's said taxable income was taxable, and the amount of income tax that

plaintiff was due and bound to pay according to law on said income was six per cent (6%) upon and of said taxable income; that the total taxable income on which said plaintiff was legally assessed and on which it should legally pay an income tax was Seventy-Nine Thousand Nine Hundred Twenty Dollars ($79,920.00).

Further answering, defendant alleges that during the year 1913 the Wisconsin Tax Commission re-assessed the income of the plaintiff for the year 1911, and in said re-assessment corrected errors and omissions made by said Commission in the assessment of tax on income of plaintiff for the year 1911; that in said re-assessment the said Wisconsin Tax Commission increased the amount of depreciation as made in the original assessment for the year 1911, and accepted the depreciation as given by the plaintiff in the return made by it to the Commission for the year 1911.

Further answering, defendant alleges that in the re-assessment made by the Commission in the year 1913 for the tax on income of plaintiff for the year 1911, said Wisconsin Tax Commission corrected an oversight in the assessment originally made of tax on income for the year 1911, said oversight having consisted in failing to take into account that manufacturing at a given place constitutes the transaction of business at that place; that by the correction of said oversight the net taxable income of the plaintiff was Seventy-Nine Thousand Nine Hundred Twenty Dollars ($79,920.00); that in arriving at said sum of Seventy Nine Thousand Nine Hundred Twenty Dollars ($79,920.00) as the net taxable income of plaintiff, the Commission deducted from said net income the sum of Seventeen Thousand Two Hundred Dollars ($17,200) because of deductions and credit to stockholders; that by said corrected re-assessment the net tax to be paid by said plaintiff
49 for the year 1911 was Four Thousand Six Hundred Ninety-four and 56/100 Dollars ($4,694.56), instead of Three Thousand Nine Hundred Ninety-four and 56/100 Dollars ($3,994.56) as originally assessed against the plaintiff.

Further answering, on information and belief, defendant denies each and every other allegation in plaintiff's complaint not hereinbefore denied, admitted or otherwise stated and asks that said complaint be dismissed with costs.

HENRY J. KILLILEA,
Attorney for Defendant.

STATE OF WISCONSIN,
Milwaukee County:

Daniel T. Gerber, being first duly sworn on oath, says that he is an officer, to-wit, Chairman of the Town of Oak Creek, the defendant above named; that said defendant is a municipal quasi corporation of the State of Wisconsin and that he makes this affidavit for and on its behalf, being duly authorized so to do; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

DANIEL T. GERBER.

Subscribed and sworn to before me this 17th day of September, 1914.

[SEAL.] A. C. ROSSBACH,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Oct. 17, 1915.

50 [Endorsed:] (Copy.) State of Wisconsin, Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, vs. Town of Oak Creek, Defendant. Amended Answer. Henry J. Killilea, Attorney for Defendant. Filed Sep. 21, 1914. C. C. Maas, Clerk.

51 Filed Sep. 21, 1914. C. C. Maas, Clerk.

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
vs.
TOWN OF OAK CREEK, Defendant.

Stipulation.

For the purposes of this action and for no other purpose whatsoever, the parties to the above entitled action by their respective attorneys hereby stipulate that the statements of fact hereinafter contained are true.

1. That the allegations contained in paragraphs 1, 2, 6, and 8 of plaintiff's complaint are true, and that Exhibits A. and B. attached to said complaint are correct copies of the originals of the documents mentioned in paragraphs 6 and 8 of said complaint.

2. That within the time fixed and allowed by chapter 658 of the Laws of Wisconsin for the year 1911, otherwise known as sections 1087*m*-1 to 1087*m*-30 of the Wisconsin Statutes, and which is hereinafter called the Wisconsin income tax law, plaintiff duly furnished to and filed with the Tax Commission of the state of Wisconsin, hereinafter called the Tax Commission, a true and accurate statement and return of the receipts or income received from
52 all sources by the plaintiff during the year ending December 31, 1911, which statement was duly verified by the oath of plaintiff's president and treasurer, and set forth all facts required to be stated therein by the said Wisconsin income tax law and the requirements and regulations of the said Tax Commission, and was made in the manner and form required and prescribed by said law and the regulations of said commission pursuant thereto, and that the plaintiff in all respects, in due time, manner and form, complied with all of the orders, requests and regulations of said Tax Commission relative to such statement and return; that a copy of said statement and return is hereto attached, marked Exhibit 1, and made a part hereof, except that nothing herein contained shall be construed as an admission that the plaintiff correctly interpreted the provisions of said income tax law or the rules and

regulations prescribed by said tax commission in arriving at the amount stated in its said statement and return.

3. That the full value of the property of the plaintiff within the state of Wisconsin in said year 1911 was the sum of $753,181.61; that the full value of the entire property of the plaintiff both within and without the state of Wisconsin in said year was $1,060,900, and that the total receipts or income of the plaintiff for said year from rentals, stocks, bonds, securities or evidences of indebtedness was the sum of $10,390.81.

4. That the total receipts or income of the plaintiff for said year 1911 other than that derived from rentals, stocks, bonds,
53 securities or evidences of indebtedness, was the sum of $1,279,850.71, which said sum was derived and received wholly from sales of glue, gelatin, grease and other products manufactured or purchased by the plaintiff and sold by it throughout the state of Wisconsin and in other states of the United States of America and in foreign countries, and is hereinafter referred to as plaintiff's "business income."

5. That the net receipts or income of the plaintiff other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness for the year 1911, after making the deductions allowed by said Wisconsin income tax law as computed by the plaintiff, was the sum of $123,884.34; that the said net receipts or income for said year as computed by said Tax Commission was the sum of $143,200; that the difference between the net receipts or income of the plaintiff as computed by the plaintiff and as computed by the said Tax Commissioner arises and consists wholly of the difference between the amount claimed by the plaintiff and the amount allowed by the said commission for depreciation of the plaintiff's property.

6. That during said year 1911 the plaintiff maintained branches at Boston, Massachusetts; New York, New York; Chicago, Illinois; Richmond, Virginia; Cincinnati, Ohio; and Grand Rapids, Michigan; at each of which branches the plaintiff carried stocks of the goods hereinbefore mentioned and dealt in by the plaintiff,
54 each of said branches being in charge of a manager who received orders for such goods and employed traveling men to solicit orders therefor; that a part of the orders received at said branches and by the traveling men employed as aforesaid were filled, and the goods covered thereby shipped from the stocks carried at said branches as aforesaid, and the rest of said orders were forwarded by said managers to plaintiff and filled, and the goods covered thereby shipped from plaintiff's factory at Carrollville in the defendant town; that the stocks carried and sold at the said several branches were in part manufactured by plaintiff at its factory in Carrollville, Milwaukee County, Wisconsin, and shipped thence by plaintiff to said branches before sale thereof to customers, and in part were purchased by the plaintiff from other manufacturers or dealers outside the state of Wisconsin and shipped direct from the place of purchase to the said branches, or shipped from the place of purchase to plaintiff's factory at Carrollville, and thence to the said branches.

7. That of the plaintiff's business income the sum of $165,223.38 was received and derived from goods sold to customers within the state of Wisconsin, and shipped to such customers by the plaintiff from its factory at Carrollville; that of the plaintiff's net income as computed by plaintiff as aforesaid the sum of $15,999.47 was derived from such goods, and that of plaintiff's net income as computed by said Tax Commission as aforesaid the sum of $18,494.07 was received from such goods.

8. That of said business income the sum of $672,308.46 was received and derived from goods sold to customers outside of the state of Wisconsin and shipped to such customers by the plaintiff from its factory at Carrollville; that of plaintiff's net income for said year as computed by plaintiff as aforesaid the sum of $65,103.26 was derived from such goods, and that of plaintiff's net income for said year as computed by said Tax Commission as aforesaid the sum of $75,258.98 was received from such goods.

9. That of said business income the sum of $323,609.47 was received and derived from goods sold to customers outside the state of Wisconsin, said sales being made and goods shipped from plaintiff's branches aforesaid, and said goods having been manufactured by the plaintiff at its Carrollville factory, and shipped before sale to said branches; that of the plaintiff's net income as computed by plaintiff as aforesaid the sum of $31,336.86 was derived from such goods, and that of plaintiff's net income as computed by said Tax Commission as aforesaid the sum of $36,222.82 was received from such goods.

10. That of said business income the sum of $71,200.02, was received and derived from goods sold to customers outside the state of Wisconsin, said sales being made and goods shipped from plaintiff's said branches and said goods having been purchased by the plaintiff outside the state of Wisconsin, shipped from the place of purchase to plaintiff's factory at Carrollville, and thence shipped before sale from said factory to said branches; that of plaintiff's net income as computed by plaintiff as aforesaid the sum of $6,894.68 was derived from such goods, and that of plaintiff's net income as computed by said Tax Commission as aforesaid the sum of $7,969.69 was received from such goods.

11. That of said business income the sum of $46,987.02 was derived from goods sold to customers outside the state of Wisconsin, said sales having been made and goods shipped from said branches, and said goods having been purchased by plaintiff outside the state of Wisconsin and shipped from the points of purchase direct to said branches without coming into the state of Wisconsin; that of the plaintiff's net income as computed by plaintiff as aforesaid the sum of $4,550.07 was derived from such goods, and that of plaintiff's net income as computed by said Tax Commission as aforesaid the sum of $5,259.44 was received from such goods.

12. That the amount of net receipts stated in paragraphs numbered 7, 8, 9, 10 and 11 are each calculated and determined by apportioning the total net income of the plaintiff from its business and operations for said year to said several classes of business men-

tioned in said several paragraphs above enumerated in proportion to the business income from said several classes of business, and that the witnesses for plaintiff if called would testify that the net receipts of the plaintiff from the conduct of its business were as to each of the said several classes of business mentioned in said paragraphs above enumerated substantially in proportion to the gross receipts or business income therefrom.

87 13. That the assessed valuation of the property of plaintiff used and employed in the acquisition of its taxable net income for said year was the sum of $341,950.00.

14. That on or about the 15th day of October, 1912, said tax commission in form made an assessment of the net taxable income of this plaintiff and in form assessed same in the sum of $66,576.00, and in form computed, assessed and levied upon the plaintiff a tax upon its said income so fixed at the rate of six per cent., amounting to the sum of $3,994.56; that in making said assessment and in assessing and levying said tax, said tax commission changed the allowance claimed by plaintiff for depreciation of its property from $71,238.00 to $51,922.00, without any evidence being produced before said commission other than the return of said plaintiff, and notified plaintiff thereof after said change had been made by a letter dated October 15, 1912, copy of which is hereto attached, marked Exhibit 2 and made a part hereof.

15. That upon the receipt of said letter, Exhibit 2, letters were exchanged between plaintiff and said tax commission, copies whereof are hereunto attached and marked Exhibits 3, 4, 5 and 6 and made a part hereof.

16. That thereafter said tax commission certified to the county clerk of Milwaukee County a statement of the aforesaid assessment of the plaintiff upon its income for the year 1911 and of the tax thereon so in form assessed, computed and levied by said tax commission and thereafter the said county clerk of Milwaukee

88 County certified the said assessment and tax to the town clerk of the defendant town of Oak Creek and said assessment and tax were placed upon the tax roll of said town for the year 1912 and said tax roll was delivered to the town treasurer of said town, together with a warrant for the collection of the taxes thereon shown, including said tax against the plaintiff, at the time and in the manner provided by law.

17. That no notice was given to plaintiff by said tax commission of any hearing by or before said tax commission for the purpose of considering, determining and assessing the amount of plaintiff's taxable income for the said year 1911 and that no hearing was had by or before said tax commission in respect thereof and no evidence was submitted to said tax commission in respect thereof other than the said Exhibits 1, 2, 3, 4, 5, and 6.

89 18. That excluding property of the plaintiff yielding income to the amount of $10,390.81 received from rentals, stocks, bonds, securities and other evidences of indebtedness, the full value of plaintiff's property within the state of Wisconsin in the year 1911 was $717,225.51, and the full value of plaintiff's

property within and without the state of Wisconsin in said year was $1,024,943.90.

19. That the gross sales by the plaintiff in the year 1911 within the state of Wisconsin amounted to $165,223.38, and that the gross sales of the plaintiff in said year within and without the state of Wisconsin amounted to $1,279,850.77.

20. That the value of the products manufactured by the plaintiff within the state of Wisconsin in the year 1911 other than such of said products as were sold in said year to customers within said state was $731,123.98.

21. That on October 10, 1913, the tax commission in form reassessed the plaintiff's income for the year 1911; that in making said reassessment the tax commission allowed the depreciation as claimed by the plaintiff in its return for the year 1911, Exhibit 1 hereof, and determined plaintiff's net income subject to apportionment between business within and without said state of Wisconsin to be the sum of $123,884.34, as shown by its said return, Exhibit 1 hereof; that for the purpose of apportioning plaintiff's net income for said year as between business within and without the state of Wisconsin and determining what part thereof was subject to tax in said state the tax commission formed a fraction the numerator of which consisted of the value in dollars of the property of plaintiff in the state, $717,225.51, plus the gross
60 sales by plaintiff to customers within the state of Wisconsin in 1911, amounting to $165,223.38, plus the value of products manufactured by the plaintiff in 1911 within the state of Wisconsin, excluding the value of such of said products as were sold to customers within said state in said year, $731,123.98, making the numerator of said fraction 1,613,572.87; and the denominator of said fraction consisted of the value of plaintiff's property within and without the state, $1,024,943.90, plus the gross sales by plaintiff to customers within and without the state of Wisconsin in 1911, amounting to $1,279,850.77, making the denominator of said fraction 2,304,794.67; that said fraction expressed in decimals is .70 plus; that said tax commission thereupon decided that 70% of plaintiff's net apportionable income of $123,884.34 subject to apportionment as aforesaid, amounting to $86,730.00, was derived from business transacted and property located within the state of Wisconsin; that said commission also decided that the plaintiff was entitled to credit or deduction from its taxable income for said year to the extent of $17,200 on account of certain deductions made to plaintiff's stockholders; that thereupon the said tax commission assessed plaintiff's taxable income for the year 1911 as follows:

Income from stocks, bonds, etc.	$10,200.00	
Income from business transacted & property located in Wisconsin	86,720.00	
Total taxable income		$97,120.00
Less income assessed and taxed in 1912	$66,576.00	
Deductions to stockholders	17,200.00	
		83,776.00
Additional taxable income for 1911		$13,344.00

Thereupon said tax commission levied a tax at the rate
61 of six per cent upon said additional taxable income, amounting to $700.64; that Exhibits 7, 8, 9, 10, 11, 12, 13 and 14 hereto annexed and made part hereof are true and correct copies of letters exchanged by and between the plaintiff and said tax commission.

22. That no notice of the said reassessment of plaintiff's income for the year 1911 was given to the plaintiff and no hearing in the matter of the making of said reassessment was had, and no evidence was submitted to or considered by said tax commission other than such as is contained in or shown by the exhibits hereto attached and made part hereof, except a report of the engineer of said tax commission referred to in said exhibits and a certain conference between the tax commission and the officers and attorneys of the plaintiff held on or about August 15, 1913, at which the tax commission notified the said officers and attorneys that it intended to reassess the plaintiff's income for the year 1911 and in such reassessment to take into account the manufactured value of the goods manufactured by the plaintiff in the state in said year and sold to customers outside the state of Wisconsin.

23. That on or about the 29th day of January, 1914, the plaintiff paid to the treasurer of the defendant town the sum of $700.64, the amount of the additional tax upon its income for the year 1911 so as aforesaid assessed and levied by said tax commission; that said payment was made under written protest in substantially the same form as Exhibit A. to the complaint herein; that thereafter and on or about the 13th day of August, 1914, the plaintiff filed
62 with the town clerk of the defendant town a claim in writing for the said $700.64, which claim was in substantially the same form as Exhibit B. to the complaint herein.

Dated September 21, 1914.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff.

HENRY J. KILLILEA,
Attorney for Defendant.

WALTER DREW, *Of Counsel.*

63 "EXHIBIT 2."

Cr. 296.

No. 7783, Co. Milwaukee.

MADISON, WIS., Oct. 15, 1912.

United States Glue Co., Otjen.

GENTLEMEN: After a careful examination of your Income Tax Return, the changes indicated below have been made by the Commission, leaving as a Preliminary Assessment the sum of $66,576.00, taxable at the rate of 6% as shown below. The Commission will be glad to consider any statement, either orally, or in writing, which you may care to make with respect to this Preliminary Assessment; but unless notice that you desire to be heard is made within ten days, or unless the Commission finds it necessary to make further changes of which you will be duly notified if made, this Preliminary Assessment will be entered as final.

In addition, the interest paid upon your bonds in 1911, to the amount of $— has been assessed to "The Bondholders of —" at the rate of —% which tax, according to the provisions of Section 1087m-3 (*b*) Chapter 658 Laws of 1911, "shall be a lien upon the property and business of such corporation prior to all other liens, and unless paid by the bondholders shall be enforced against the corporation. When paid by the corporation the amount of such tax may be deducted from the next interest payment on such bonds, unless otherwise provided by contract."

Respectfully yours,

64 WISCONSIN TAX COMMISSION.

Income.	Am't returned.	As changed by tax com.
Net taxable income.....	58,990.64	66,576.00
Rate of Tax	.....	6%
Amount of tax	.....	3,994.56

65 "EXHIBIT 3."

October 24, 1912.

Wisconsin Tax Commission, Madison, Wis.

GENTLEMEN: Referring to your notice of Oct. 15th. We object to the assessment return you have made and would like the privilege of being heard on this matter at your convenience. Will you kindly designate a day.

Yours truly,

UNITED STATES GLUE CO.
W. G. HANSON, *Mgr.*

W. G. H.—D.

66 "EXHIBIT 4."

October 29, 1912.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: In reply to your letter of October 24 beg to say that the change in your assessed value results altogether from a reduction of your depreciation claimed from $71,238 to $51,922. The commission will be in continuous session for the remainder of the week and will be glad to see you at any time, but it is probable that this matter, as it relates wholly to the depreciation claimed, can be easily settled by correspondence, thus avoiding the necessity of a trip to Madison.

Respectfully yours,

WISCONSIN TAX COMMISSION.
A. J. MYRLAND, *Secretary.*

T. S. A.—E. J. K.

67 "EXHIBIT 5."

Nov. 4, 1912.

Wisconsin Tax Commission, Madison, Wis.

GENTLEMEN: Replying to your esteemed favor of the 29th inst. in which you state that you reduced our depreciation charge from $71,238 to $51922. We would like you to give us your reasons for this reduction, inasmuch as the charge we have made is our usual and customary charge for depreciation.

If in your estimation you consider the charge excessive we wish to say that the nature of manufacturing glue is such that owing to the use of strong acids and the excessive moisture at all times present in the buildings that some sections of our buildings are absolutely worthless after a period of ten to twelve years. This can be verified by the experience of any glue manufacturer in the United States.

We would like your explanation of the above matter and will present our side of the case if given the opportunity. Kindly let us hear from you.

Yours truly,

UNITED STATES GLUE COMPANY.
W. G. HANSON, *Mgr.*

W. G. H.—D.

68 "EXHIBIT 6."

Please refer to 7783, Milwaukee-A.

November 7, 1912.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We have your letter of Nov. 4th. We fear that it is now too late to make any change in the assessment as the final roll has been placed in the hands of the county clerk. We held open the assessment as long as it was possible or legal and regret that your representations on the subject were not received earlier. The

changes which were made in your depreciation allowance were based upon the standard percentages allowed to companies of a similar character.

It is possible that by reason of the facts stated in your letter of Nov. 4th a depreciation allowance of more than the average amount should be made. If this proves to be correct the only practicable way we know of rectifying the matter is to allow such an amount of depreciation next year as will cover not only the annual deterioration but any additional amount that should have been allowed this year.

Respectfully yours,

WISCONSIN TAX COMMISSION,
By A. J. MYRLAND, *Secretary*.

T. S. A.—C. E. S.

60

"EXHIBIT 7."

August 5, 1913.

In re Milwaukee, 7783-A.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We write with reference to your income tax return. Late last year, practically after the assessment had been certified to the county clerk, the United States Glue Co. objected to our reduction of their depreciation claimed and we promised to take the matter up this year.

After careful consideration of the subject, and in view of the fact that this matter has been taken to the courts for adjustment—as we understand,—the rates of depreciation used by the commission in making its estimate seem on the whole to be reasonable, and the same method of computing the deductible depreciation has been followed this year. More specifically depreciation on buildings has been allowed at 3 per cent. and on machinery and equipment at 8 per cent. This results in a reduction of your depreciation claimed from $75786.07 to $55171.71, increasing the net income from the amount stated to $74092.68. Of this amount $3192 is derived from revenues of stocks, bonds, securities, etc. and is not apportionable. The remainder of $70901 in round figures, is subject to the apportionment process. According to our computations the proportion of income derived from property located and business transacted within the state of Wisconsin amounts to 69.2 per cent. In arriving at this result we have included among the business transacted within the state the value of the products manufactured in 1912. The total property and business within the state as we compute it amounts to $1706094

70 and contains the book value of the property within the state, the sales within the state, and the value of the products manufactured within the state, minus the factory cost of those goods included in the sales within the state of $169538. We estimate the factory cost of the goods included in the sales within the state at $162725, and if our estimate is wrong, we shall be glad to have the correct figures.

Applying the proportion of 69.2 per cent., to the apportionable income and adding the non-apportionable income makes a total taxable income of $52262. By a recent amendment to the income tax law, chapter 720 of the laws of 1913, the rate of taxation upon corporations has been changed and the tax at the new rate—a little less than 6 per cent.—will amount to $2975.72.

The commission will be glad to consider any statement which you may care to make with respect to this preliminary assessment, but unless notice that you desire to be heard is received within ten days, this assessment will be entered as final.

Respectfully yours,

WISCONSIN TAX COMMISSION.
——— ———, *Secretary.*

T. S. A.—P. C. B.

71 "EXHIBIT 8."

August 7, 1913.

Refer to 7783, Milwaukee-A.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: Perhaps a word of further explanation should be added to our letter of August 5, 1913.

With respect to the question of depreciation we feel, as stated in previous communications, that the proper rates applicable to properties such as your own are difficult to determine with absolute accuracy and we should have been disposed to go into the matter somewhat more fully had your particular problem not been taken to the courts for solution. On the face of it, so far as we can learn without physical examination of the properties in question, our rates are, we believe, entirely reasonable; but as this matter will have to be settled by the courts eventually it seemed to us best to settle this year's assessment exactly as last year's was determined, leaving the matter of depreciation for both years to be revised by the court. We shall of course adjust this year's figures in accordance with the findings of the courts on this particular point.

With respect to the proportion of property and business within the state of Wisconsin it should perhaps be added that cognizance was taken this year of the fact that manufacturing within a given jurisdiction constitutes the transaction of business at that place and that taking this factor into account we included among the other items of business within the state the value of your manufactured products in 1912. Inasmuch as it would involve a duplication if the entire sales within the state were added to the entire
72 product manufactured within this state, we endeavored to subtract from the sales within this state an estimated value of the factory cost of the goods covered by the sales. We believe that our estimate was high and will do the company ample justice in this connection.

The total measure of gross business we believe to be gross sales. Gross sales we believe to represent in turn two categories of business, the first covered by factory costs, the second by the excess of sales' prices over factory costs. Accordingly gross business within and without the state is properly measured by gross sales within and without the state without consideration or special attention to factory costs properly included and covered by the gross sales.

We trust this further explanation may assist you in arriving at a better understanding of the assessment of which you were notified on the 5th inst.

Respectfully yours,

WISCONSIN TAX COMMISSION,
By —— ——, *Secretary.*

T. S. A.—C. E. S.

73

"EXHIBIT 9."

August 28, 1913.

In re 7783, Milw. A.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: In accordance with the promise made during recent conference, one of the engineering staff of the commission will visit your plant in the near future to investigate the question of depreciation as affected by the peculiar conditions under which your work is carried on.

In readjusting the assessment for 1911 we desire, as stated at the conference, to correct the apportionment fraction by taking further account of the manufacturing or productive business of the company within the state. May we ask you accordingly to furnish for 1911 the following facts:

1. Full value of property other than that yielding $10,390.81 of non-apportionable income.
(*a*) Within the state of Wisconsin;
(*b*) Within and without the state of Wisconsin.
2. Gross sales during 1911.
(*a*) Within the state of Wisconsin;
(*b*) Within and without the state of Wisconsin.

Value of products manufactured by the company in 1911 within the state of Wisconsin, excluding the value of those products included in the sales within the state (2. (*a*), above.)

As soon as we have received the report of our engineer and your answers to the above questions, we shall revise the assessment for 1911 and advise you of the result.

Yours respectfully,

WISCONSIN TAX COMMISSION,
—— ——, *Secretary.*

T. S. A.—A. L.

74 "EXHIBIT 10."

September 23, 1913.

In re Milw., 7783-A.

United States Glue Co., Milwaukee, Wisconsin.

GENTLEMEN: We have received report from our engineer in whose opinion the depreciation originally claimed in your income tax report for 1911 should be allowed, provided care is exercised in making all renewals and replacements from depreciation and in charging up any betterment to proper property accounts.

As soon as you have given us the information requested in our letter of August 23 we will recompute the taxable income for 1911, allowing the depreciation originally claimed and make the proper readjustments in this year's assessment as required by chapter 27, laws of 1913.

Respectfully yours,

WISCONSIN TAX COMMISSION.
By ——— ———, *Secretary.*

T. S. A.—E. J. K.

75 "EXHIBIT 11."

United States Glue Co.

MILWAUKEE, WIS., Sept. 26, 1913.

Wisconsin Tax Commission, Madison, Wis.

GENTLEMEN: We are in receipt of your favor of the 23rd inst, and are pleased to note that you have found our depreciation as reported, correct. We wish to assure you that we will use the same care in handling this account properly in the future as we have in the past. We will endeavor to get the information requested in yours of the 23rd ult. off within a few days.

Yours truly,

UNITED STATES GLUE CO.
———— ————, *Mgr.*

76 "EXHIBIT 12."

United States Glue Co.

MILWAUKEE, WIS., Oct. 3, 1913.

Wisconsin Tax Commission, Madison, Wis.

GENTLEMEN: Replying to your favor of the 23rd of August, we have finally secured the information you desired, and report as follows:

1. Full value of property other than that yielding the $10,390.81 of non-apportionable income.

(a) Within the State of Wisconsin $717225.51.

(b) Within and without the state of Wisconsin, $1024948.20.

2. Gross sales during 1911.
(a) Within the state of Wisconsin, $165223.38.
(b) Within and without the state of Wisconsin, $1279850.77.
3. Value of products manufactured by company in 1911 within the state of Wisconsin, excluding the value of those products included in the sales within the state 2. (a) above, $731123.98.

Trusting you will find this in order, we are

Yours truly,

UNITED STATES GLUE CO.
—— ——, *Mgr.*

77

"EXHIBIT 13."

In re Mil., 7783-A.

October 10, 1913.

United States Glue Co., Milwaukee, Wisconsin.

GENTLEMEN: We have your letter of October 3 and have revised the assessments for 1911 and 1912, accepting the report as made in each case, making no reduction in the depreciation, but including in business within this state the value of the product manufactured therein, as explained in our letters of August 5 and 7, 1913.

On this basis the assessment for income of 1912 amounts to $37,902, the tax upon which at the new schedule of rates amounts to $2119.50. The apportionment fraction used was 69.2 per cent. Of the net income reported, $3192 from rentals and mortgages was taxed in its entirety without apportionment.

The assessment based upon income of 1911 when revised shows an additional taxable income of $13,344, the tax upon which amounts to $700.64, and should be paid in January 1914 along with taxes based upon income of 1912. The following computation shows more in detail the way in which this corrected result for last year was reached:

Income for 1911.

Net income reported	$134,275.15
Income from rentals, stocks, bonds, etc.	10,390.81
Apportionable income	123,884.34
Per Cent taxable in Wisconsin—70 plus.	
Amount apportioned to Wisconsin	$86,730.00
Income from stocks, bonds, etc.	10,390.00
Total Taxable Income	97,120.00
78 Forward	97,120.00
Income assessed and taxed last year	$66,576.00
Net income to be added	30,544.00
Credit on account of deductions to stockholders	17,200.00
Additional taxable income for 1911	13,344.00
Tax rate 6% Additional Tax	700.64

The above will be self-explanatory except perhaps for the credit of $17,200. Owing to the way in which the assessment was made last year resident stockholders did not receive sufficient deduction on the dividends received from the United States Glue Co. Taking this fact into account we have by an estimate, very liberal to the company, computed the extra deduction to which such stockholders would have been entitled had the assessment been properly made at $17,200, and this has been deducted, as shown, from the additional net income of the company. If the company insists we will make this correction with absolute accuracy, tracing down the exact assessments of the stockholders in question, and making the correction accurately. We feel assured, however, that it will be in the neighborhood of this amount, and almost certainly less. Accordingly, in order to save time we have adopted this figure.

If the company desires to make any statement regarding the computation and methods involved in these assessments, we shall of course be glad to take it into consideration. The general principle, however, treating as business within the state manufacturing done therein, is, we think, hardly open to discussion at this time, before the commission at least. The matter has been given careful consideration. We think we are entirely right. Whether we are right or wrong, we are so committed to the principle that it would be useless at this time to consider any argument in that connection. If
79 there are any mistakes or corrections to be made in our figures, we shall of course be glad to make them, but application should be made at once as it is necessary to close the assessment.

Respectfully yours,

WISCONSIN TAX COMMISSION.
—— ——, *Secretary.*

T. S. A.—E. J. K.

80 "EXHIBIT 14."

United States Glue Co.

MILWAUKEE, WIS., Oct. 16, 1913.

Wisconsin Tax Commission, Madison, Wis.

GENTLEMEN: Replying to your favor of the 10th inst., we have checked over the figures you have sent us and find them correct according to your point of view. We are assuming that the allowance of $17200. on account of error in assessing stockholders is correct.

Yours truly,

UNITED STATES GLUE CO.
—— ——, *Mgr.*

H.—H. S.

(Here follows income tax return blank, marked pages 81 to 84.)

EXHIBIT 1.

FORM NO. 5. READ ACCOMPANYING INSTRUCTIONS CAREFULLY.

INCOME TAX RETURN
FOR
WISCONSIN CORPORATIONS
(LICENSED TO TRANSACT BUSINESS IN OTHER STATES.)

INCOME OF 1911

(In accordance with Chapter 658, Laws of Wisconsin for 1911.)

THIS RETURN MUST BE MADE TO THE WISCONSIN TAX COMMISSION BEFORE

RETURN of income received during the year 1911 by United States Glue Co.
.....a corporation incorporated under the Laws of
and having its principal place of business at Carrollville, Otjen P. O., Wis
(Give street and number.)
.....in said state.

1. Total amount of paid-up capital stock outstanding at close of year Dec. 31, 1911 $
2. Total amount of bonded indebtedness outstanding at close of year $
3. Specify lines of business in which engaged Mfgrs. Glue, Gelatine & Grease

GROSS INCOME
(CLASSIFY SO FAR AS PRACTICABLE UNDER FOLLOWING HEADS:)

(a.) From operations of business stated above (not including items b. to i. below) $
(b.) From rent of real estate $
(c.) Interest on notes secured by mortgage $
(d.) Interest on unsecured notes or other evidences of indebtedness $
(e.) Interest on bonds $
(f.) Dividends on stocks of other corporations $
(g.) Profits derived during the year 1911 from the sale of any property purchased within three years previous to the date of sale (see Instruction No. 5) $
(h.) Royalties derived from the use of franchises or legal privileges of any kind (including royalties on patents) $
(i.) From other sources not above specified Store $
Glue stock sales
Discount
$
$

TOTAL GROSS INCOME—(carried forward) $

CONDENSED TABLE OF RATES FOR CORPORATIONS

If the proportion which the taxable income bears to the assessed value of the property used in such

Less than	1%	the rate of tax is	½ of			
More than	1%	but not over	2%	the rate of tax is		
"	2%	" "	3%	" "		
"	3%	" "	4%	" "		
"	4%	" "	5%	" "		
"	5%	" "	6%	" "		
"	6%	" "	7%	" "		
"	7%	" "	8%	" "		
"	8%	" "	9%	" "		
"	9%	" "	10%	" "		
"	10%	" "	11%	" "		
"	11%	" "	12%	" "		
More than	12%			" "		

85 [Endorsed:] Circuit Court—Milwaukee County. United States Glue Company, Plaintiff, vs. Town of Oak Creek, Defendant. Stipulation. Filed Sep. 21, 1914. C. C. Mass, Clerk. Copy.

86 Filed Jan. 30, 1915. C. C. Mass, Clerk.

In Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

This action coming on for trial at the July, 1914, term of said court, and having been tried before the court, a jury trial having been waived, on the 21st day of September, 1914, upon the pleadings and the stipulation of facts entered into and signed by the parties by their respective counsel and heretofore filed herein as and for appearing for the plaintiff, and Henry J. Killilea, Esq., and Walter Drew, Esq., deputy attorney general, appearing for the defendant, and after hearing and considering the allegations and proofs of the parties and the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law, constituting my decision in said action:

Findings of Fact.

I hereby adopt the stipulation of facts entered into by the parties by their respective counsel and heretofore filed herein as and for my findings of fact in this case.

Conclusions of Law.

1. That the income of the plaintiff for the year 1911 subject to taxation under the provisions of sections 1087*m*-1 to 1087*m*-
87 30 inclusive of the Wisconsin Statutes was the sum of $26,-39.28, of which sum $10,390.81 was income derived from rentals, stocks, bonds, securities and evidences of indebtedness, and $15,999.47 was income derived from property located and business transacted within the state of Wisconsin other than from rentals, stocks, bonds, securities and evidences of indebtedness; that the tax lawfully due and payable by the plaintiff upon its said income for the year 1911 was the sum of $1,055.61, which said tax was paid by the plaintiff on the 29th day of January, 1913.

2. That the plaintiff is entitled to recover of the defendant the sum of $2,885.38, with interest thereon from January 29, 1913.

Let judgment be entered accordingly.

Dated January 30th, 1915.

By the Court.

J. C. LUDWIG,
Circuit Judge.

89 [Endorsed:] Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Findings of Fact and Conclusions of Law. Copy. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed Jan. 30, 1915. C. C. Maas, Clerk.

89 Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

At a General Term of the Circuit Court for Milwaukee County, Begun and Held at the Court House, in the City of Milwaukee, in said County, on the First Monday of January, 1915, and on the 8th Day of February, 1915, in said Term.

Present: Hon. John C. Ludwig, Circuit Judge.

The above entitled action having come on for trial before the court without a jury at the general July 1914 term of said court, and the court having made and filed its findings of fact and conclusions of law and an order for judgment therein, now, on motion of Lines, Spooner, Ellis & Quarles, attorneys for the plaintiff,

It is adjudged, that the plaintiff, United States Glue Company, do have and recover of and from the defendant town of Oak Creek the sum of thirty-one hundred seventy-nine *dollars* and 87/100 (3179.87) dollars damages, and the sum of One Hundred Six 02/100 dollars costs, aggregating for damages and costs the sum of three thousand two hundred eighty five and 89/100 dollars.

Dated February 8, 1915.

By the Court:

C. C. MAAS, *Clerk*,
By CHAS. SCHERER,
Dep. Clerk.

$3179.87
106.02

$3285.89

89 [Endorsed:] D. Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, v. Town of Oak Creek, Defendant. Judgment. Copy. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis. Filed & docketed Feb. 8, 1915 at 10:30 a. m. C. C. Maas, Clerk.

91 STATE OF WISCONSIN:

In Supreme Court.

No. 145.

UNITED STATES GLUE COMPANY, Plaintiff and Respondent,
vs.
TOWN OF OAK CREEK, Defendant and Appellant.

An appeal from a judgment of the circuit court of Milwaukee county, Honorable J. C. Ludwig, Circuit Judge. Reversed.

The plaintiff brought this action to recover the sum of 2,835.38 dollars with interest from January 29th, 1913. Plaintiff, under protest paid this sum to defendant as income tax and claims it was in excess of the amount lawfully due from it as income tax on its income for the year 1911 and assessed in the year 1912.

The plaintiff is a corporation organized under the laws of this state and is located and has its principal place of business at Carrollville in the town of Oak Creek, Milwaukee county. The plaintiff conducted the business of manufacturing glue, gelatine, grease and other products and sold these products in this and other states of the United States and in foreign countries. Its manufacturing was done at its plant in the town of Oak Creek, the defendant in this action. It maintained general offices at its plant in Carrollville and conducted all of its business there, except such as was conducted at its established branch business places in the cities of Boston, Mass.; New York City, New York; Chicago, Illinois; Cincinnati, Ohio; Richmond, Virginia and Grand Rapids, Michigan. At these
92 places the plaintiff carried stocks of its goods. Each place was in charge of a manager, who employed traveling men to solicit orders for goods. A part of the goods covered by orders obtained by salesmen were shipped to the purchasers from the stocks at these branches, and the rest of such orders were sent by the managers to the plaintiff's headquarters at Carrollville and the goods called for by them were shipped from the factory at Carrollville. The stock of goods at these branches was in part manufactured at the factory in Carrollville and sent to the branch houses, before sale thereof, and the rest of the goods at these branches the plaintiff purchased from manufacturers and dealers outside of this state and were shipped from the places of purchase either directly or by way of plaintiff's factory to these branches.

The parties agreed upon the material facts of the case and stipulated that in 1911:

(1) The value of plaintiff's property within the state was 753,181.61 dollars. The value of its property within and without the state was 1,060,900 dollars.

(2) Plaintiff's income from rentals, stocks, bonds, securities or evidences of indebtedness was 10,390.81 dollars.

(3) Plaintiff's income from its business (exclusive of the above

item of 10,390.81 dollars) for 1911 was 1,279,850.71 dollars, which is designated hereafter as its business income.

(4) The state tax commission computed plaintiff's net "business income" for 1911 at 143,200 dollars. After making the deductions provided for by the law, the tax commission computed plaintiff's taxable income for 1911 to be 66,576 dollars upon which it assessed an income tax at the rate of 6 per cent amounting to 3994.56 dollars.

(5) In 1913 the tax commission made a reassessment of plaintiff's 1911 income to correct alleged errors in their assessment thereof in 1912, and upon their computation for reassessment found that 18,344 dollars of plaintiff's net taxable income for 1911 had been omitted for the tax of 1912 and made an assessment thereon at the rate of 6 per cent amounting to 700.65 dollars, which the plaintiff paid under protest and included in its demand of recovery in this action.

(6) It is also stipulated that the plaintiff's net "business income" for 1911 arising from the conduct of its business was derived as follows:

(*a*) The sum of 15,999.47 dollars was realized from the manufacture, sale and delivery of goods from its factory to customers residing in the state of Wisconsin.

(*b*) The sum of 65,103.26 dollars was realized from the manufacture, sale and delivery of goods from its factory to customers residing outside of the state of Wisconsin.

(*c*) The sum of 31,336.86 dollars was realized from the manufacture of goods at the factory, sent to branch houses outside of Wisconsin and the sale and delivery of such goods from the branch houses to customers residing outside of the state of Wisconsin.

(*d*) The sum of 11,444.75 dollars was realized from the purchase of goods in the market outside of the state of Wisconsin and shipped from the places of purchase either directly or by way of plaintiff's plant at Carrollville to its branch houses, and the sale and delivery of such goods to customers residing outside of the state of Wisconsin.

The trial court adopted the facts as stipulated by the parties as its findings of fact in the case, and as conclusions of law held that plaintiff's taxable income for the year 1911 under the provisions of sections 1087*m*-1 to 1087*m*-30 (Stats. 1911) inclusive, was 10,390.81 dollars income derived from rentals, stocks, bonds, securities and evidences of indebtedness and 15,999.47 dollars of the income derived from conducting the business specified and described in the foregoing classes (*a*), (*b*), (*c*) and (*d*) as "business income," and that the income tax lawfully due thereon was the sum of 1,055.61 dollars, which tax was paid by plaintiff on the 29th day of January, 1913; that plaintiff was unlawfully required to pay the sum of 2,835.33 dollars in excess of the lawful amount due as income tax, and the court awarded plaintiff judgment for the recovery of 2,835.33 dollars with interest thereon from January 29th, 1913. From such judgment this appeal is taken.

For the appellant there were briefs by H. J. Killilea, attorney and

the Attorney General and Walter Drew, deputy attorney general of counsel, and oral argument by Mr. Killilea.

For the respondent there was a brief by Lines, Spooner, Ellis & Quarles and oral argument by George Lines.

SIEBECKER, J.:

The income tax law of 1911 provides: "There shall be assessed, levied and collected and paid a tax upon incomes received during the year ending December 31, 1911 * * *" (Sec. 1087m-1 Stats. 1911). "The tax shall be assessed, levied and collected upon all incomes, not hereinafter exempted, received by every person residing within the state and by every non-resident of the state upon such income as is derived from sources within the state * * *; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and properly located within the state, which shall be determined in the manner specified in subdivision (c) of subsection 7 of section 1770b, as far as applicable." (Sub. 3 Sec. 1087m-2, Stats. 1911.) The taxability of the income derived from rentals, bonds, etc., is not in controversy. All parties agree that the tax commission properly taxed this item of 10,390.81 dollars.

The defendant, the town of Oak Creek, contends that the court erred in holding that the part of the plaintiff's net "business income," denominated class (a) in the foregoing statement, which is derived from the manufacture, sale and delivery of its products at its plant in Carrollville to customers in the state of Wisconsin only, is subject to be taxed as income under the foregoing provisions of the income tax law. On the part of the plaintiff it is claimed that the judgment of the trial court is correct, upon the ground that the net "business income" derived by plaintiff from the manufacture, sale and delivery of its goods to customers in this state constitutes the net income derived from business transacted and located within this state in the sense of this law, and that the "business income" derived from goods sold to customers outside of the state, whether manufactured at and shipped from its factory a Carrollville or purchased outside of this state and then delivered from its branch houses, was derived from transactions in interstate commerce and therefor- not taxable, because it is a burden on such commerce and is repugnant to sec. 8 of Art. 1 of the constitution of the United States whereby it conferred on Congress the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

The question naturally arises first; what portion of plaintiff's net "business income" is income "derived from business transacted and property located within the state," and subject to the tax upon incomes? We are of the opinion that this provision of the statute includes all of plaintiff's net "business income" derived from the manufacture, sale and delivery of such of its products as were man-

ufactured at, sold and delivered from the factory to customers in Wisconsin and other states, and the net "business income" of its products which were manufactured at its factory at Carrollville and shipped from there to its branch houses out of the state and delivered from there to customers residing outside of the state,
97 on sales made either at Carrollville or at the branch houses.

The trial court held that the net "business income" of the sales of the latter class (embraced in classes (*b*) and (*c*) of the foregoing statement) was not subject to an income tax, because such portion of plaintiff's income is not "derived from business transacted and property located within the state." This court in State ex rel. Arpin v. Eberhardt, 158 Wis. 20, 147 N. W. 1016, had under consideration the provisions of these statutes involving this question and interpreted them to the effect that the income of a person residing in the state, other than that derived from rentals, stocks, bonds, securities and evidences of indebtedness, is taxable if derived from sources within the state, and income derived from sources without the state is not taxable under the statutes. The plaintiff's business enterprise, in the light of the income statutes, must be considered in the twofold character as respects income producing. In its corporate existence it is a unit with its principal business and headquarters located at Carrollville. In its business aspects it is divided into two parts, one located and conducted at its headquarters at Carrollville and the other located and conducted at its branches in the designated cities of other states. It is well understood that many elements of business, other than the use of capital or the service of employees to perform the necessary labor, enters into the production of an income in the sense involved in taxation, and that the sources of such income are not abso-
98 lutely separable, one from the other. The observations of the court in Wilcox v. County Commissioners, 103 Mass. 544, are enlightening and helpful. Income in the sense of tax laws is not the capital or stocks of goods in which the capital may be expended: "It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country." The statute is to receive a practical interpretation. This court recently said on the subject: "Philosophical and logical distinctions must yield to the clearly expressed intent of the written law and to the possibility of a practical administration thereof." (State ex rel. Manitowoc Gas Co. vs. Tax Commission, 152 N. W. 848 decided June 1st, 1915.) "If an income be taxed the recipient thereof must have a domicile within the state, or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. * * * The income tax law does not seek to reach property or an interest in property as such, but to reach in-

comes having a situs in the state, or growing out of a privilege exercised or occupation conducted within the state." (ibidem) The plaintiff, as recipient of its corporate income, whatever its source has a domicile in this state, and the principal part of its property and its business, which is employed in the transactions out of which the income issues, is located in this state. The statute seeks to tax the part of this income which has its source in this state. The fact that the business so conducted may involve transactions in interstate commerce cannot effect the situs of the income. Nor does the fact that goods manufactured at Carrollville are sold without the state effect the source of the income. The income so derived is the result of the business carried on at Carrollville in this state. The place of sale of such products does not change the place of business from this to the state where the goods are sold. The statute does not contemplate such a result and clearly intends that the source of the income is at the place where the business is carried on. The transactions involved in producing the product at the plant at Carrollville and disposing of them through intra or interstate transactions is in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses, to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. We cannot, in the light of the nature of the general conduct of the business, assent to the claim that the shipping and delivery of goods, manufactured at the plant, from branch houses are the controlling elements of such transactions and that they give such business a situs without the state. The manufacture, the management and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitutes the source out of which the income issues and gives it a situs within the state under the income tax law. The income derived from goods which were produced and purchased outside of the state and shipped, either directly or by way of plaintiff's factory at Carrollville, to plaintiff's branch houses and thence sold and delivered to customers without the state is clearly a separable class of plaintiff's business. Such business is transacted and located without the state, excepting incidental management from and accounting for the result thereof to plaintiff's principal office at Carrollville. The carrying on of this part of the trade according to the findings of fact produced an income, which issued out of the business and property located without the state. Under the facts and circumstances showing the manner of conducting this part of the plaintiff's business, it must be held that the income derived therefrom is attributable to the business conducted without the state and hence not taxable under the law.

The plaintiff contends that the judgment of the trial court must stand, because all income of the plaintiff derived from business conducted in this state, except that portion derived from goods sold to customers in this state, is derived from transactions in interstate

commerce and the imposition of a tax on such income is repugnant to plaintiff's rights under section 8 of Article 1 of the constitution of the United States, providing that: "The congress shall have power: To regulate commerce with foreign nations, and among the several states, and with the Indian tribes". The de-
101 fendant urges that there is no such conflict between the powers thus granted to Congress and the powers exerted by the legislature under the state income tax law. The power of a state to tax its people and their property in all the recognized ways of levying and collecting taxes is an acknowledged attribute of its sovereignty, which it may exert to the fullest extent for the purpose of providing revenue to defray the expenses of conducting the government. In exerting this governmental function it is not permitted to levy and collect taxes on any instrumentalities or property employed by the federal government to carry its powers into execution. (McCulloch v. Maryland, 4 Wheaton 316 and subsequent cases,) * * * no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (Leloup v. Port of Mobile, 127 U. S. p. 648.) 8 Sup. Ct. 1380. The foregoing is the conclusion as stated by Bradley J., who delivered the opinion for the court, and he cites thereto a large number of cases. This established doctrine is followed in many subsequent cases. The question had received extensive examination and elaboration in Phila. Steamship Co. v. Penn., 122 U. S. 326, 7 Sup. Ct. 1118, involving a tax imposed by the state of Pennsylvania on gross
102 receipts of a steamship company conducting an interstate traffic, which was held a burden on interstate commerce and hence repugnant to the exclusive power of Congress to regulate such commerce. Bradley J. delivered the opinion of the court in this case also, in which he discussed at length the reasons and grounds of the conclusion reached, namely, that the tax on the gross receipts of such business, as such, is a tax on such business, because: " * * * they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment." In a part of the opinion this learned jurist answers for the court the claim made that the tax in question was in the nature of an income tax, and declares that: "It is not a general tax upon the incomes of all the inhabitants of the state; but a special tax on transportation companies. * * * As a tax on transportation * * * it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which

are properly taxable." The result of the court's consideration of the question led it to declare that: "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal
103 government." The laying and collecting of an income tax by a state imposes a burden on its citizens wholly unlike a tax upon their business or commerce. The tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts or the property employed in interstate commerce. In fact the tax deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of the commerce have been discharged and such net profits are merged in the assets of the corporation. The income tax is in effect not unlike the tax which was imposed on corporations under the act of Congress in the Tariff Act of 1909 and known as the "Corporation Tax". This law imposed a tax on incomes of corporations from all sources. In the case of Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, it was urged upon the court that this tax was invalid because the income taxed was in part derived from business of corporations engaged in interstate commerce. The court held that the burden imposed was * * * a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described." The act involved incomes derived from business transactions involving interstate commerce under the exclusive control of the federal government and from sources which were non-taxable under the constitution and laws of the federal government, and the claim was pressed upon the court that these features of the act invalidated the tax on income derived from such sources. But the court rejected the contention, declaring: "It is therefore well settled by the decisions of
104 this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation, as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed." (Opinion, page 165.) We are of the opinion that the tax imposed by the income tax law of this state does not impose a burden on the business or property of plaintiff in any sense repugnant to its rights under the provision of the federal constitution conferring on Congress the right to regulate commerce between the states, and that the trial court erred in holding that the income tax imposed by the tax commission was excessive and in awarding recovery for the amount of such alleged excess with interest.

By the Court: The judgment appealed from is reversed and the cause remanded to the circuit court with direction to award judgment dismissing plaintiff's complaint.

Barnes, J., dissents.

[Endorsed:] United States Glue Co. vs. Town of Oak Creek. Opinion Supreme Court. Filed Jul- 21, 1916. C. C. Mass, Clerk.

105 Be it remembered, that at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said state, on the second Tuesday, to-wit, on the twelfth day of January A. D. 1915, on the thirty-fifth day of the term, to-wit: on the 16th day of June, A. D. 1915, Present, John B. Winslow, Chief Justice, R. D. Marshall, Robert G. Siebecker, James C. Kerwin, William H. Timlin, John Barnes and And J. Vinje, Justices of said court, the following proceedings were had, Inter Alia, to-wit:

UNITED STATES GLUE COMPANY, Respondent,
vs.
TOWN OF OAK CREEK, Appellant.

Appeal from Circuit Court, Milwaukee County, State of Wisconsin.

Filed Jan. 14, 1916. C. C. Mass, Clerk.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, reversed with costs against the said respondent taxed at the sum of eighty five & 75/100 dollars, ($85.75.)

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to award judgment dismissing plaintiff's complaint.

Justice Timlin took no part.

STATE OF WISCONSIN,
Supreme Court, ss:

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 13th day of January, A. D. 1916.

[SEAL.] ARTHUR A. McLEOD,
Clerk of the Supreme Court
of the State of Wisconsin.

[Endorsed:] 40831. State of Wisconsin Supreme Court. United States Glue Company, Respondent, against Town of Oak Creek, Appellant. Remittitur. Filed Jan. 14, 1916. C. C. Maas, Clerk.

106 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
vs.
TOWN OF OAK CREEK, Defendant.

Judgment having been entered in the above entitled action in the circuit court of Milwaukee County on the 8th day of February, 1915, in favor of said plaintiff and against the defendant for the sum of Thirty-two Hundred Eighty-five and 89/100 ($3,285.89) Dollars, and said judgment having been appealed from to the Supreme Court of the State of Wisconsin, and said Supreme Court having rendered a decision in said action on the 16th day of June, 1915, reversing the decision of the circuit court of Milwaukee County and ordering that the cause be remanded with directions to dismiss the complaint, and the Court herein having made its order in accordance with said decree of the Supreme Court that said complaint be dismissed.

Now on motion of Henry J. Killilea, defendant's attorney,

It is hereby adjudged that the complaint in the above entitled action be and the same hereby is dismissed, and it is

Further adjudged that the defendant herein, Town of Oak Creek, recover from the plaintiff herein, United States Glue Company, the sum of Twenty-nine and 94/100 (29.94) Dollars costs and disbursements in said action.

Dated Milwaukee, Wis., March 4th, 1916.

By the Court:

C. C. MAAS, *Clerk*,
By CHAS. SCHERER,
Deputy Clerk.

107 [Endorsed:] 40831. State of Wisconsin, Circuit Court, Milwaukee County. United States Glue Company, Plaintiff, vs. Town of Oak Creek, Defendant. Judgment. 31548. Pd. $6.20. Henry J. Killilea, Def't's Att'y. Filed Mar. 4, 1916, at 10:25 A. M. C. C. Maas, Clerk. Received Mar. 7, 1916. Lines, Spooner, Ellis & Quarles, Attorneys.

108 Circuit Court, Milwaukee County.

UNITED STATES GLUE COMPANY, Plaintiff,
v.
TOWN OF OAK CREEK, Defendant.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, C. C. Maas, clerk of the circuit court in and for the count
Milwaukee and state of Wisconsin, do hereby certify that the a
and foregoing is a true and correct transcript of all that pa
the record and proceedings indicated by precipe now on file an
record in my office, with all things concerning the same, in the a
entitled cause, and in obedience to the within writ of error h
annexed I herewith transmit to the Supreme Court of the Un
States the said transcript, together with the original writ of e
petition therefor, and order allowing the same, assignment of er
prayer for reversal, citation with its service endorsed thereo
copy of the supersedeas bond and of the opinion and mandat
the supreme court of the state of Wisconsin, together wit
109 things concerning the same.

In witness whereof, I have hereunto set my hand
affixed the seal of said court at Milwaukee, Milwaukee Cou
Wisconsin, this 20" day of July, A. D. 1916.

[Seal Circuit Court Milwaukee Co., Wisconsin.]

C. C. MAAS,
Clerk of Circuit Court of Milwaukee County, Wisconsi
By CHAS. SCHERER,
Deputy Cler

Endorsed on cover: File No. 25,417. Wisconsin, Milwau
County Circuit Court. Term No. 587. United States Glue C
pany, plaintiff in error, vs. The Town of Oak Creek. Filed J
25th, 1916. File No. 25,417.

INDEX.

	Page
Statement of Case	1- 9
Wisconsin Income Tax Act	2- 6
Sources of Plaintiff's Income	8
Assignment of Errors	9-10
Contention of Plaintiff in Error	10
Synopsis of Argument	11

Argument—First.

(1) Section 8 of Article I. of the U. S. Constitution gives to Congress exclusive power to regulate interstate commerce....11-14

(2) A tax upon income is a tax upon the property or business from which the income is derived....14-16

(3) A state tax upon income, gross or net, from interstate commerce is an unconstitutional burden upon and regulation of such commerce....16-19

(4) It is the substance and effect and not the form of a tax which determines its legality or illegality....19-20

Argument—Second.

The Wisconsin Income Tax Act (Chap. 658, Laws 1911) is an income tax law pure and simple....20-26

Argument—Third.

The tax levied and collected by the state of Wisconsin upon that portion of plaintiff's income for 1911 which was derived from interstate commerce was unconstitutional....26-31

Argument—Fourth.

It is immaterial that the Income Tax Act of Wisconsin taxes income which the state had power to tax as well as income from interstate commerce which the state had no power to tax....31-32

CASES CITED.

Bayfield County vs. Pishon, 102 Wis., 466	24
Block vs. State, 113 Wis., 205	21, 22
Collector vs. Day, 11 Wallace, 113	14
Crab vs. Pennsylvania, 97 U. S., 566	19
Crew Levick Co. vs. Pennsylvania, Decided Dec. 10, 1917	15, 18
Dobbins vs. Erie County, 16 Peters, 435	14
First vs. Stone Tracy Co., 220 U. S., 107	22
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196	12, 19
G. R. & M. C. Co. vs. Patten Co., 172 U. S., 58	12
Income Tax Cases, 148 Wisconsin, 456	22, 24
McCulloch vs. Maryland, 4 Wheaton, 316	13
Milwaukee vs. Patton, 158 Wisconsin, 617	24

Page

Mining Co. vs. Platteville, 163 Wisconsin, 215..... 24
Nunnemacher vs. State, 129 Wisconsin, 190..... 21
Oklahoma vs. Wells, Fargo & Co., 223 U. S., 298..... 19
Philadelphia Steam Ship Co. vs. Pennsylvania, 122 U. S., 326..... 19
Pollock vs. F. L. & T. Co., 157 U. S., 429..... 15
Pollock vs. F. L. & T. Co., 158 U. S., 601..... 15
Postal Telegraph Cable Co. vs. Adams, 155 U. S., 688..... 17
Rafferman vs. Telegraph Co., 127 U. S., 411..... 19
Robbins vs. Shelby Taxing Dist., 120 U. S., 489..... 12
State ex rel Arpin vs. Eberhardt, 158 Wisconsin, 20 24
State ex rel Brenk vs. Widule, 161 Wisconsin, 396..... 24
State ex rel Bundy vs. Nygaard, 163 Wisconsin, 207.....24, 25
State ex rel Manitowoc Gas Co. vs. Tax Commission, 161 Wisconsin, 111.24, 25
State ex rel Trust Co. vs. Widule, 164 Wisconsin, 56.....24, 25
State ex rel Wickham vs. Nygaard, 159 Wisconsin, 306..... 24
Telegraph Co. vs. Alabama, 132 U. S., 472..... 19
Telegraph Co. vs. Kansas, 216 U. S., 1..... 20
Van Dyke vs. Milwaukee, 159 Wisconsin, 460.....24, 25
Weston vs. Charleston, 2 Peters, 449..... 15

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916

No. 587.

UNITED STATES GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE TOWN OF OAK CREEK, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN.

BRIEF FOR PLAINTIFF IN ERROR.

The writ of error in this case brings up for review a judgment of the circuit court of Milwaukee County, Wisconsin, dismissing the complaint of the plaintiff in error (T. 47) which judgment was entered in obedience to the judgment and mandate of the supreme court of the state of Wisconsin commanding the same to be entered (T. 46).

The action was brought by the plaintiff in error to recover from the defendant in error the sum of $2835.38 paid by plaintiff in error January 29, 1913, on account of a tax assessed and levied by the taxing authorities of the state of Wisconsin upon the income of the plaintiff in error for the year 1911. The case was tried in the circuit court of Milwaukee County, all of the facts being stipulated by the parties. The trial resulted in a judgment in favor of plaintiff in error from which defendant in error appealed to the supreme court of the state which reversed the judgment and remanded the case to the circuit court with instructions to enter judgment dismissing the complaint.

While some other questions were raised in the state courts the principal ground there relied upon was that plaintiff's income taxed by the state was derived from interstate commerce, and that the tax assessed and collected by the state authorities was a burden upon interstate commerce contravening Section 8 of Article 1 of the constitution of the United States.

Whether the tax upon its income for 1911 which plaintiff was compelled to pay and which it has sued to recover was an unlawful burden upon the interstate commerce from which the income taxed was derived is the sole question presented by the pending writ.

The tax was assessed and collected pursuant to the provisions of Chapter 658 of the Laws of Wisconsin for the year 1911, the material portions of which are as follows:

"CHAPTER 658

"AN ACT to create sections 1087m-1 to 1087m-30, inclusive, and amend section 1036; subsection 10, of section 1038; subsection 11, of section 1038; subdivision (a), of subsection 11a, of section 1038a: subdivision (h), of subsection 11a, of section 1038; and repeal subsection 10a, of section 1038 of the statutes, relating to taxation of incomes, and making an appropriation therefor.

"Section 1. There are added to the statutes thirty new sections to read: Section 1087m-1. There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such person and from such sources as hereinafter described; provided, that firms, copartnerships, corporations, joint stock companies and associations which customarily close their annual accounts on a date other than December 31, or which customarily estimate their income or profits on a basis other than that of actual cash receipts and disbursements, may, with the consent and approval of the tax commission, return for assessment and taxation the income or profits earned during the business year for which the accounts of such person are customarily made up.

"Section 1087m-2. 1. * * *

"2. The term 'income,' as used in this act, shall include:

"(a) All rent of real estate, including the estimated rental of residence property occupied by the owner thereof.

"(b) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever.

"(c) All wages, salaries or fees derived from services; provided that compensation to public officers for public service shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the constitution.

"(d) All dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous or from any business whatever.

"(e) All royalties derived from the possession or use of franchises or legalized privileges of any kind.

"(f) And all other income of any kind derived from any source whatever except such as is hereinafter exempted.

"3. The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every non-resident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within state, which shall be determined in the manner specified in subdivision (e) of section 1770b, as far as applicable.

"Section 1087m-3. Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:

"(a) Payments made within the year for personal services of officers and employes actually employed in the production of such income; provided, there be reported the name, address and amount paid each such officer or employe to whom a compensation of seven hundred dollars or more shall have been paid during the assessment year.

"(b) Other ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property, including a reasonable allowance for depreciation of property from which the income is derived. All bonds issued by a corporation shall be deemed an interest in the property and business

of such corporation; and so much of the interest payable on such bonds as is represented by the ratio between the property located and business transacted within this state to the total property and business of such corporation as provided in subdivision 3, of section 1087m-2, shall be subject to taxation under this act at the same rate as the income of such corporation. Such tax shall be assessed to the bondholders under the general designation 'The Bondholders of * * *' (inserting the name of the corporation), but shall be a lien upon the property and business of such corporation prior to all other liens, and unless paid by the bondholders shall be enforced against the corporation. When paid by the corporation the amount of such tax may be deducted from the next interest payment on such bonds, unless otherwise provided by contract.

"(c) Losses actually sustained within the year and not compensated for by insurance or otherwise.

"(d) Sums paid by such person within the year for taxes imposed by any state of this union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived.

"(e) Dividends or income received within the year from stocks or interest in any firm, copartnership or corporation, joint stock company or association, the income of which shall have been assessed under the provisions of this act; provided, such firm, copartnership, corporation, joint stock company or association report at the time of assessment the name and address of each such person owning stocks or interest in the same and the amount of dividends or income paid such person during the assessment year.

"(f) Interest received from bonds or other securities exempt from taxation under the laws of the United States.

"Section 1087m-6. 1. * * *

"2. * * * the tax to be assessed, levied and collected upon the incomes of corporations, joint stock companies or associations, after making due allowance for deductions as hereinbefore provided, shall be computed at the following rates, to-wit:

"(a) If the taxable income equals one per cent. or less of the assessed value of the property used and employed in the acquisition of such income, the rate of tax shall be one-half of one per cent. of such income.

"(b) If the taxable income equals more than one, but does not exceed two per cent. of the assessed value of the property used and employed in the acquisition of such income, the rate of tax shall be one per cent. of such income.

"(c) If the taxable income equals more than two, but does not exceed three per cent. of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be one and one-half per cent. of such income.

"(d) If the taxable income equals more than three, but does not exceed four per cent. of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be two per cent. of such income.

"(e) If the taxable income equals more than four, but does not exceed five per cent. of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be two and one-half per cent. of such income.

"(f) If the taxable income equals more than five, but does not exceed six per cent. of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be three per cent. of such income.

"(g) And in like manner the tax upon the taxable income shall continue to increase at the rate of one-half of one per cent. for each additional one per cent. or fractional part thereof that the taxable income bears to the assessed value of the property used and employed in the acquisition of such income, until the rate of profits equals twelve per cent. of such assessed value of the property used and employed in the acquisition of such income, when such rate shall continue as a proportional rate of six per cent. of such taxable income.

"Section 1087m-10. 1. * * *

"3. Every corporation, joint stock company or association, whether taxable under this act or not, shall furnish to the tax commission a true and accurate statement at such time, in such manner and form and setting forth such facts as said commission shall deem necessary to enforce the provisions of this act. Such statement shall be made upon the oath or affirmation of the president, vice-president or other principal officer and the treasurer of said corporation, joint stock company or association.

"Section 1087m-26. Any person who shall have paid a tax upon his personal property during any year shall be permitted to present the receipt therefor to, and have the same accepted by, the tax collector to its full amount in the payment of taxes due upon the income of such person during said year. Any bank which has paid taxes during any year upon its shares assessed to the individual stockholders thereof shall be entitled, under the provisions of this section, to present the receipt therefor, and have the same accepted by the tax collector to its full amount in the payment of taxes due upon the income of such bank during said year."

Section 1770b referred to in section 1087m-2, subdivision 3, above quoted, is part of a statute prescribing the terms and conditions upon which foreign corporations may do business in Wisconsin.

Subsection 7, of section 1770b, requires as one of these conditions the filing of an annual report which shall show among other things the proportion of the capital stock of the corporation represented by its property located and business transacted in Wisconsin, and paragraph (e) of subsection 7 prescribes how this proportion shall be ascertained. This is the paragraph intended by the reference in Section 1087m-2.3 to "Subdivision (e) of Section 1770b." The material portion of this paragraph reads as follows:

"(e) The proportion of the capital stock represented in the state of Wisconsin by its property located and business transacted therein during the preceding year. In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state, added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state."

Chapter 658 also contained other provisions for the enforcement of the tax and providing penalties for non-observance of its requirements. It was carried into the Wisconsin Statutes of 1911 and has formed a part of each subsequent issue of the statutes as chapter 48a, being therein designated as "The Income Tax Act."

In 1911 plaintiff in error was and still is a Wisconsin corporation having a factory at Carrollville in the defendant town and was there engaged in the business of manufacturing and selling glue, gelatine, and grease, most of its product being sold to customers in states other than Wisconsin. In 1911 it also purchased some goods from other manufacturers and dealers outside of Wisconsin and sold the same to customers outside of that state, some of these goods being first shipped to the factory at Carrollville and others to branches maintained by plaintiff in error in other states.

As required by section 1087m-10.3, above quoted, plaintiff in error made return to the Wisconsin tax commission of its income for the year 1911, and in all respects complied with the requirements of the income tax act. In October, 1912, the tax commission found and determined that the income of the plaintiff for 1911, other than that derived from rentals, stocks, bonds, securities, or evidences of indebtedness, and after making the deductions allowed by the income tax act, was the sum of $143,200, and applying thereto the rule laid down in section 1087m-2.3 and subdivision (e) of subsection 7, section 1770b, found and determined that the portion of said income which was derived from business transacted and property located within the state of Wisconsin was $56,185.19, and adding thereto income from rentals, stocks, bonds, and securities amounting to $10,390.81, about the taxability of which there is no question, found plaintiff's total taxable income to be $66,576.00, upon which it assessed a tax of six per cent., amounting to $3,994.56.

Plaintiff in error having paid taxes on its personal property amounting to $1,159.18, presented its receipt therefor to the treasurer of defendant town as provided in section 1087m-26, and at the same time paid to the treasurer the balance of the tax upon its income as assessed by the tax commission amounting to $2,835.38, which sum it seeks to recover in this action.

Thereafter and in October, 1913, the tax commission revised its assessment of plaintiff's income for 1911, and then found and determined the income other than that derived from rentals, stocks, bonds, etc., to be $123,884.34, but also found and determined the amount apportionable to Wisconsin to be $86,730.00, and assessed an additional tax of $700.64 upon plaintiff's income for 1911. This revision and reassessment however is not involved in the present case except that defendant by an amended answer set up the same and alleged that the tax found thereby, amounting to $4,694.56, was the true amount of tax upon plaintiff's 1911 income and justified retention by the town of all which had been exacted from the plaintiff.

It is stipulated (see transc. pp. 23-28, and 40) that plaintiff's income in 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the income tax act and which as finally found and determined by the tax commission amounted to $123,884.34 (called in the record and in the opinion of the Wisconsin Supreme Court *plaintiff's business income*), was derived from the following sources:

(a) The sum of $15,999.47 was received and derived from goods sold to customers within the state of Wisconsin, and shipped to such customers by the plaintiff from its factory at Carrollville.

(b) The sum of $65,103.26 was received and derived from goods sold to customers outside of the state of Wisconsin and shipped to such customers by the plaintiff from its factory at Carrollville.

(c) The sum of $31,336.86 was received and derived from goods sold to customers outside the state of Wisconsin, said sales being made and goods shipped from plaintiff's branches, and said goods having been manufactured by the plaintiff at its Carrollville factory and shipped before sale to said branches.

(d) The sum of $6,894.68 was received and derived from goods sold to customers outside the state of Wisconsin, said sales being made and goods shipped from plaintiff's said branches, and said goods having been purchased by the plaintiff outside the state of Wisconsin, shipped from the place of purchase to plaintiff's factory at Carrollville and thence shipped before sale from said factory to said branches.

(e) The sum of $4,550.07 was derived from goods sold to customers outside the state of Wisconsin, said sales having been made and goods shipped from said branches and said goods having been purchased by plaintiff outside the state of Wisconsin and shipped from the point of purchase direct to said branches without coming into the state of Wisconsin.

Upon the trial plaintiff contended that the income described in paragraphs (d) and (e) was not taxable under the Wisconsin income tax act, because not derived from property located or business transacted within the state of Wisconsin, and this contention was upheld by both the circuit and supreme courts. (See 161 Wisconsin, 218-19; Transcript 43.)

Plaintiff also contended that the income described in paragraphs (b) and (c) was not taxable because derived from interstate commerce. This contention was upheld by the circuit court, but overruled by the supreme court of Wisconsin, which latter court in effect held that the state might lawfully have taxed all of plaintiff's income, including that derived

from interstate commerce, and that plaintiff could not complain that the tax imposed upon a portion of its income ascertained in the manner specified in the income tax act was excessive or "repugnant to its rights under the provision of the federal constitution conferring on congress the right to regulate commerce between the states."

The controlling question in the state courts therefore was, as it is here, whether the state could lawfully impose a tax upon the income described in paragraphs (b) and (c) *supra*, all of which was received from interstate commerce. If it could not, plaintiff's taxable income for 1911 consisted of that described in paragraph (a) *supra*, derived from the manufacture and sale of goods within the state of Wisconsin, amounting to $15,999.47, plus $10,390.81, derived from rentals, stocks, bonds, etc., being in the aggregate $26,390.38, and the tax thereon, amounting to $1,055.61, was fully offset and paid by the personal property tax of $1,159.18 paid by plaintiff, and in this event the original judgment of the circuit court was correct and its reversal by the supreme court of Wisconsin and the entry of the second judgment of the circuit court as commanded by the state supreme court were erroneous. If on the other hand the state could lawfully tax plaintiff's income from interstate commerce, the decision of the state supreme court and the judgment of the circuit court brought up by this writ of error are correct.

ASSIGNMENTS OF ERROR.

The assignments of error are:

1. The supreme court of Wisconsin and the circuit court of Milwaukee County erred in reversing, vacating, and setting aside the judgment entered in the said circuit court of Milwaukee County on the 8th day of February, 1915, in favor of the plaintiff, United States Glue Company, and against the defendant, Town of Oak Creek.

2. The supreme court of the state of Wisconsin erred in ordering and directing the circuit court of Milwaukee County to enter judgment in said action in favor of said defendant, Town of Oak Creek, and against said plaintiff, United States Glue Company, dismissing the complaint of said plaintiff in said action and for costs.

3. The circuit court of Milwaukee County erred in entering the judgment dated March 4, 1916, in favor of the defendant, Town of Oak Creek, and against the plaintiff, United States Glue Company, dismissing the plaintiff's complaint with costs.

4. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding

that the tax levied and imposed by Chapter 658 of the Laws of Wisconsin for the year 1911, otherwise known as Section 1087m-1 to 1087m-30, inclusive, Wisconsin Statutes of 1911, and particularly by subdivision 3 of section 1087m-2, Wisconsin Statutes of 1911, upon the income of persons engaged in business within and without the state of Wisconsin in so far as such income is derived from interstate commerce does not constitute an unlawful burden upon or regulation of interstate commerce, and that said subdivision 3 of section 1087m-2, Wisconsin Statutes of 1911, as respects income derived from interstate commerce, does not contravene the provisions of section 8 of Article I. of the constitution of the United States.

5. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and imposed by the taxing authorities of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $65,103.26, which was derived and received by the plaintiff, United States Glue company, upon the sale of goods manufactured by the plaintiff within the state of Wisconsin and sold by plaintiff to purchasers or customers outside of the state of Wisconsin and shipped to said purchasers or customers by said United States Glue Company from its factory in said state of Wisconsin, was not a burden upon or regulation of interstate commerce and did not contravene the provisions of section 8 of Article I. of the constitution of the United States.

6. The said supreme court of Wisconsin and the said circuit court of Milwaukee County erred in holding and deciding that the tax levied and assessed by the taxing officers of the state of Wisconsin upon the income of the plaintiff, United States Glue Company, for the year 1911, amounting to $31,336.86, which was derived and received by the plaintiff, United States Glue Company, from the sale of goods manufactured by the plaintiff within the state of Wisconsin and shipped by the plaintiff to branch houses or depots maintained by the plaintiff in states other than Wisconsin and thence sold by the plaintiff and shipped to purchasers or customers outside of the state of Wisconsin, was not a burden upon or regulation of interstate commerce, and did not contravene the provisions of section 8 of Article I. of the constitution of the United States.

These assignments of error amount to the single contention heretofore stated that the tax which the plaintiff seeks to recover in this action, being levied upon income derived from interstate commerce, constituted an unlawful burden upon and regulation of the interstate commerce from which the income was derived.

SYNOPSIS OF ARGUMENT.

First.

(1) Section 8 of Article I. of the constitution of the United States which gives to congress power to regulate commerce among the several states prohibits the states from in any way burdening or regulating that commerce.

(2) A tax upon incomes is a tax upon the property or business from which the income is derived.

(3) A state tax upon the receipts or income, gross or net, derived from interstate commerce is an unconstitutional burden upon and regulation of the commerce from which the income is derived.

(4) It is the substance and effect and not the form of a tax or the name given to it which determines whether or not it is an unconstitutional burden upon and regulation of interstate commerce.

Second.

Chapter 658, Laws of Wisconsin for 1911, is solely an income tax law and to the extent that as construed by the state courts it imposes a tax upon income derived from interstate commerce contravenes section 8 of Article I. of the constitution of the United States.

Third.

The tax levied and collected by the state of Wisconsin upon that portion of the income of plaintiff in error for the year 1911 which was derived from interstate commerce was unconstitutional and void.

Fourth.

It is immaterial that the Income Tax Act of Wisconsin taxes income which the state had power to tax as well as income from interstate commerce which the state had no power to tax.

ARGUMENT.

First.

(1) This case is controlled by section 8 of Article I. of the constitution, which so far as material reads:

> "Section 8. The congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

A very long line of decisions has established and confirmed the principle that this clause of the constitution denies to the states the power which it grants to the congress. As said in a leading case:

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in congress."

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, 203-4.

"In such matters there can be no divided empire."

Canal Co. vs. Paper Co., 172 U. S., 58-80.

By the clause of the constitution above quoted, interstate commerce is placed exclusively under the sovereignty of the federal government and that of the states is excluded. This debars the states from the imposition of any kind of a tax upon that commerce, for as this court has said, the power of taxation

> "is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."
>
> *M'Culloch vs. Maryland,* 4 Wheaton, 316, 429.

It would savor of affectation to cite the numerous cases in which the exclusive power of congress over interstate commerce has been declared and the power of the states to place burdens thereon has been denied, but we may be pardoned for quoting from the opinion of this court in a leading case expressing the limitations of state power.

In *Robbins vs. Shelby Taxing District,* 120 U. S., 489,493, Mr. Justice Bradley said: (pp. 493-4)

> "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due equality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state

from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to congress over the subject.

"For authorities on this last head it is only necessary to refer to those already cited.

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

(2) It is now equally well settled that a tax upon income from property or business is a tax upon the property or business from which the income is derived, and that if the property or business is outside the taxing power, the income therefrom is equally beyond reach of that power.

In *Dobbins vs. The Commissioners of Erie County,* 16 Peters, 435, a tax levied by the state of Pennsylvania upon the salary of a captain in the United States Revenue Cutter Service was held void on the ground that a tax upon the salary was a tax upon the office, and that as the state could not rightfully tax the federal office or function it could not tax the salary or income incident to or arising therefrom.

In *Collector vs. Day,* 11 Wallace, 113, a tax levied upon the salary of a state judge under the federal income tax act of June 30, 1864, and the amending acts of 1865, 1866, and 1867, was held void on the ground that it was in effect a tax upon the office itself which was beyond the taxing power of congress. In speaking of the case of *Dobbins vs. The Commissioners of Erie County,* the court said:

"The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the states and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt."

11 Wallace, 122-3.

In *Weston vs. Charleston,* 2 Peters, 449, it was held that the states had no power to tax the interest or income upon United States bonds and in that case Chief Justice Marshall said (p. 465):

"The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract."

In *Pollock vs. Farmers Loan & Trust Company,* 157 U. S., 429, and 158 U. S., 601, it was held that congress could not lawfully impose a tax upon the income from state or municipal bonds for the reason that such a tax would be in effect one upon the securities themselves, and it was further held that a tax upon the rental of real estate was a tax upon the land. Upon both of these questions the court was unanimous and also upon the proposition that no tax could be imposed upon the income from state and municipal bonds because the bonds issued in the exercise of the borrowing power of the states and municipalities were outside the field of federal taxation. There was division of opinion only upon the question whether a tax upon the rental of land was a direct tax which must be apportioned under section 9 of Article I. of the constitution.

In 157 U. S., 580, the court said:

"If the constitution had provided that congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the constitution now reads, no unapportioned tax can be imposed upon real estate, can congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?"

And on the same subject Mr. Justice White said in his dissenting opinion (pp. 646-7):

"All these cases involve the question whether, under the constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by congress which reached real estate indirectly *would necessarily*

violate the constitution, because as it had no power in the premises, every attempt to tax direct or indirectly would be null."

In the final decision it was said (158 U. S., 630):

"We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, *the same rule applies to revenue from any other source not subject to the tax;* and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom."

(3) When we come to consider the authorities bearing directly upon the specific question involved in the case at bar, we find them equally conclusive in holding that a tax upon income derived from foreign or interstate commerce is a tax upon that commerce and when levied by a state violates the constitution of the United States. Most of the cases have dealt with the income of instrumentalities of foreign or interstate commerce instead of income from "the purchase, sale, and exchange of commodities" (114 U. S., 203) the subjects of such commerce.

But in the most recent case which had come to our attention at the time of writing this brief it was income of the latter class which was involved. In the case of *Crew Levick Company vs. Commonwealth of Pennsylvania*, decided December 10, 1917, this court held that section 8 of Article I. of the constitution was contravened by a statute of Pennsylvania which provided that "each wholesale vendor of or wholesale dealer in goods, wares, and merchandise shall pay" * * * a tax of "one-half mill * * * on each dollar of the whole volume, gross, of business transacted annually," when such tax was levied upon the business of a wholesaler engaged in foreign commerce or the income derived therefrom. In that case this court said: (U. S. Adv. Op., 123-4)

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the federal constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of congress has been given.

"We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale vendors doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. (Citing cases)

"*Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.*" (Italics ours.)

Quoting from *Postal Telegraph Cable Company vs. Adams*, 155 U. S., 688, 695, this court further said: (p. 124)

"It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

And speaking of the Pennsylvania tax added: (p. 124)

"The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon

every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions."

We think the *Crew Levick Company* case is decisive of the one at bar. The only perceivable differences between the two cases are that in the *Crew Levick Company* case it was foreign commerce that was involved and the tax had been declared by the state court to be one "upon the business of vending merchandise * * * graduated according to the gross annual volume of business transacted," while the instant case involves interstate commerce and the tax, as will be more particularly shown later, is one upon gross income less certain specified deductions. These differences however do not call for or permit the application of a different rule

As this court said in the *Crew Levick Company* case and had previously said in many others: "There is no difference between this (interstate commerce) and foreign commerce so far as the present question is concerned," i. e., the power of a state to burden either by taxation.

And if it be true, as it undoubtedly is, as said by the court in the *Crew Levick Company* case, that the tax there under consideration, whether considered as a tax "upon the business of vending merchandise" in foreign or interstate commerce or as one upon the gross receipts of such business "operates to lay a direct burden upon every transaction in commerce by withholding for the use of the state a part of every dollar received in such transactions," it is equally true that the Wisconsin tax upon gross receipts from interstate commerce diminished by specified deductions has the same effect.

There can be no distinction drawn in reason between a tax on gross receipts or income and a tax on net receipts or income as respects the question here involved. If one is a tax upon the business from which the income is derived, so is the other. And if because of the nature of the business the state has no power to tax gross receipts or income, it is powerless in the like case to tax net receipts or income.

The whole object of engaging in commerce, foreign, interstate, or intrastate, is the acquisition of net income, and it would seem like idle playing with words to say that a tax upon the gross receipts from commerce of either kind is a tax and hence a burden upon that commerce, while a tax upon the net receipts or income from the same commerce is not a tax or burden thereon.

Many of the decisions of this court holding a state tax upon receipts from interstate commerce to be unconstitutional are

cited in the opinion in the *Crew Levick Company* case and need not be again cited. To them we add the following:

Cook vs. Pennsylvania, 97 U. S., 566.

Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 196.

Ratterman vs. Telegraph Company, 127 U. S., 411.

Telegraph Company vs. Alabama, 132 U. S., 472.

Oklahoma vs. Wells, Fargo & Company, 223 U. S., 298.

In *Philadelphia, etc., Steam Ship Company vs. Pennsylvania*, 122 U. S., 326, this court said (page 336):

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

And again, on page 338:

"To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself."

So likewise the receipts or income from sales of goods in interstate commerce are as much a part of that commerce as the goods themselves or the transaction of selling them. And no distinction has been drawn in the courts or in commercial life between the taxation of a transaction or the subject of it, and the taxation of the proceeds of it.

(4) From the beginning of the federal government, this court established and has constantly maintained the principle that it is the substance and effect of a tax and not its form or name which determines its legality or illegality. As shown by the cases already cited, to which many others might be added, this court has uniformly applied this principle to taxes on income as well as to all other kinds of taxes, and has likewise held that a law which in its effect taxes interstate commerce will not be saved by a declared purpose not to do so.

"The disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed or as to the constitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute reasonably interpreted either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but must look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

Telegraph Co. vs. Kansas, 216 U. S., 1, 27.

Adherence to this principle which has been steadily applied to taxes on income as well as to all other kinds of taxes is especially important at the present time as respects taxes on income which have now become a favorite method of taxation, not only with the federal government, but with some of the states, whose example other states are likely to follow. If it should now be held that a tax on income from interstate commerce is not a tax upon such commerce, its source, it would be possible for lawmakers to so adjust state tax laws as to discriminate in favor of local industries and against those of neighboring states. Such attempts have been made in the past, and have only been frustrated by the firm attitude of this court. No surer way to regulate, control, or suppress commerce can be found than by taxation of the income therefrom. To permit the states to tax the income from interstate commerce would necessarily impair and might altogether destroy the constitutional power of congress over such commerce, and thus inevitably lead to many of the evils for the prevention of which the regulation of interstate commerce was committed to congress.

SECOND.

In the state supreme court counsel for defendant in error contended that the tax in question is not a tax upon income, but some other kind of a tax. One of them said in his brief:

"As to the plaintiff in this case and all other residents of Wisconsin, this tax is neither more nor less than a direct personal tax designated (designed) to exact from those contributing a just, fair contribution for the support of a government under which they exist, and which protects them in the conduct of their business."

And the other, the Deputy Attorney General of Wisconsin, said in his brief:

> "If such be the nature of the tax here—a tax upon the person according to income,—then the state, having jurisdiction of the person, has jurisdiction to impose the tax, and in levying it is limited only by its needs for revenue for legitimate public purposes. It may measure the tax upon the whole income or part of the income and by any rules which do not create unreasonable discriminations or violate accepted principles of classification."

As these arguments may be repeated here, although they were not made the basis of the decision of the Wisconsin Supreme Court or even alluded to in its opinion, it becomes material to point out that they have no foundation either in the language of the income tax act or the decisions of the Wisconsin court under it. Nothing can be clearer than that the statute is an income tax law pure and simple.

Prior to 1908, the sole express authority in the Wisconsin constitution for the levying of taxes was found in section 1 of Article VIII., which read as follows:

> "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

It had been held however, by the supreme court of Wisconsin that the legislature was not limited to the imposition of taxes upon property, but might also impose excise taxes, though the constitution contained no express grant of power so to do. Thus the court had held that a tax could be imposed upon inheritances and further, by a divided bench, that the legislature could lawfully classify inheritances according to their amount and graduate the tax upon the classes established.

Nunnemacher vs. State, 129 Wisconsin, 190.

An earlier inheritance tax law had been declared unconstitutional because instead of taxing the amount received by the heir or legatee at progressive rates, as did the law involved in the *Nunnemacher* case, it taxed the entire estate at progressive rates, with the result that persons standing in the same relationship to different decedents and receiving the same amounts from their estates would be taxed at different rates, because of difference in the aggregate value of the estates. It was intimated, if not directly held, that this violated the first clause of Section 1, Article VIII., of the state constitution, to-wit: "The rule of taxation shall be uniform."

Black vs. State, 113 Wisconsin, 205.

The result of the *Black* and *Nunnemacher* cases was to leave in doubt the question whether the constitutional rule of uniformity applied to all kinds of taxes and to what extent graduated taxes might be imposed. In the mean time an agitation had sprung up in favor of taxation of incomes which culminated in the year 1908, in the adoption of an amendment to Section 1, Article VIII. of the constitution so as to read as follows, the amendment being shown in italics:

> "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. *Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided.*"

Chapter 658, Laws of 1911—the income tax act here involved—was enacted under authority of this amendment.

It does not impose a tax upon property, since the tax is not uniform. It is graduated according to the amount of income, while taxes upon property must still be uniform. This was expressly held by the Wisconsin Supreme Court in construing the act of 1911, in the first case involving the act. That court said:

> "Were the income tax a tax upon property there could be no difference in rate, for taxation of property must still be on a uniform rule, but as has heretofore been noted, it is not a tax upon property within the meaning of our constitution."
>
> *Income Tax Cases,* 148 Wisconsin, 456, 515.

Neither is it a tax upon privileges or occupations, since it applies as well to those who enjoy no privileges as to those who do, and to those who are engaged in no occupation as well as to those who are so engaged.

Nor is it an excise tax, which taxes have been defined by this court to be:

> "Taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."
>
> *Flint vs. Stone Tracy Co.,* 220 U. S., 107, 151.

This definition is in substance the same as that of the Wisconsin court which has said:

> "An excise is a duty levied on articles of sale or manufacture, upon licenses to pursue certain trades or deal in certain commodities, upon official privileges, etc."
>
> *Black vs. State,* 113 Wisconsin, 205, 218.

This statute does not levy a tax upon the manufacture, sale, or consumption of any commodity, nor does it impose a license

fee upon the pursuit of any trade or calling, or upon any official, corporate, or other privilege.

The tax is what the statute itself declares it to be—a tax upon incomes. The title of chapter 658 reads:

> "An act to create Sections 1087m-1 to 1087m-30 * * * relating to taxation of incomes and making an appropriation therefor."

Section 1 of the act declares:

> "There are added to the statute thirty new sections to read: Section 1087m-1. There shall be assessed, levied, collected, and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described."

Throughout the entire statute income is treated as the subject of the tax. Section 1087m-2.2 contains a comprehensive definition of the word *income* which includes every species of receipts commonly embraced within that term. That section reads:

> "Section 1087m-2.2. The term 'income,' as used in this act, shall include:
>
> "(a) All rent of real estate, including the estimated rental of residence property occupied by the owner thereof.
>
> (b) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever.
>
> "(c) All wages, salaries or fees derived from services; provided that compensation to public officers for public service shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the constitution.
>
> "(d) All dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous or from any business whatever.
>
> "(e) All royalties derived from the possession or use of franchises or legalized privileges of any kind.
>
> "(f) And all other income of any kind derived from any source whatever except such as is hereinafter exempted."

Commenting on this section, the tax commission of Wisconsin—the body charged with the execution of the law—says in the pamphlet copy of the law issued by it:

> "The income here defined is gross income; the taxable net income is to be computed by subtracting the deductions and exemptions hereinafter authorized."

The returns required by the commission in administering the law conform to this view. They call for the gross receipts of the taxpayer and a statement of the deductions and exemptions claimed (See Ex. 1 to stipulation found in the transcript between pp. 36 and 37). The decisions of the Wisconsin Supreme Court leave no doubt as to the character of the tax. They contain no intimation that it is other than a tax upon incomes, and many direct affirmations that such is its nature.

Income Tax. Cases, 148 Wisconsin, 456, 503-515.
State ex rel Arpin vs. Eberhardt, 158 Wisconsin, 20.
Milwaukee vs. Patton, 158 Wisconsin, 617.
State ex rel Wickham vs. Nygaard, 159 Wisconsin, 396.
Van Dyke vs. Milwaukee, 159 Wisconsin, 460.
State ex rel Manitowoc Gas Co. vs. Wisconsin Tax Commission, 161 Wisconsin, 111.
State ex rel Brenk vs. Widule, 161 Wisconsin, 396.
Bayfield Co. vs. Pishon, 162 Wisconsin, 466.
Mining Company vs. Platteville, 163 Wisconsin, 215.
State ex rel Bundy vs. Nygaard, 163 Wisconsin, 307.
State ex rel Wisconsin Trust Co. vs. Widule, 164 Wisconsin, 56.

In *Van Dyke vs. Milwaukee, supra.,* the court said: (159 Wisconsin, pp. 463-4)

> "The subject of what constitutes income in the technical or true economic sense of the word is an interesting one, and also one upon which few economists and courts agree. Fortunately we are not called upon to enter that wide and somewhat vague field in the present inquiry. The word 'income,' as used in the constitutional amendment and in the statute enacted in pursuance thereof, must be held to have been used in its common, ordinary meaning, and not in its strict, technical, or true economic sense. For it is a familiar rule of construction that ordinary words used in constitutions and statutes must be given their usual and common significance if such meaning harmonizes with the evident intent of the language employed and with the purpose to be accomplished."

And again speaking of the act:

> "Its language requires that the word 'income' be given its general and usual meaning."

In *State ex rel Manitowoc Gas Co. vs. Tax Commission, supra.*, the court said: (161 Wisconsin, p. 116)

"Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property, or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest. Such toll is property, and so is the fruit of property and labor. But as before stated, since the constitution has lawfully classified the subjects of taxation into that of property and incomes, the distinction must be observed by the courts, though logically both classes constitute property.

"The essence of the constitutional amendment authorizing income taxation is that that part of property constituting income shall be separately and differently taxed from all other property. There is nothing unlawful or inconsistent in such a classification."

In *State ex rel Bundy vs. Nygaard, supra.*, it was said:

"The constitution (sec. 1, art. VIII) permits the taxation of 'incomes,' and the statute (secs. 1087m-1 to 1087m-29, Stats. 1913) provides for the levying of a tax upon 'incomes' received during the year.

"The word 'income' has a definite, well-understood meaning. No attempt was made to define it in the constitutional amendment for the reason that it carried its meaning with it. That meaning was and is the 'common, ordinary meaning,' as the word is used in every-day life. *Van Dyke vs. Milwaukee*, 159 Wis., 460, 150 N. W., 509. In brief, it may be said to be the profit or gain derived from capital or labor or from both combined. *Stratton's Independence vs. Howbert*, 231 U. S., 399, 34 Sup. Ct., 136; *Income Tax Cases*, 148 Wis., 456, 513, 134 N. W. 673, 135 N. W., 164. It must be gain or profit and it must be money or something equivalent thereto." (163 Wisconsin, 310.)

In *State ex rel Trust Company vs. Widule, supra.*, the court said:

"The word 'income' as used in the constitution has been defined as the profit or gain derived from capital or labor or from both combined." (164 Wisconsin, 61.)

No support can be found in the constitutional amendment, in the statute, or in the decisions of the Wisconsin court construing it for the theory suggested in that court by counsel for defendant in error that the tax is one upon persons measured by the amount of their income, and that view is untenable

because the law purports to tax the income of non-residents "derived from sources within the state," as well as that of residents, while it is indisputable that the state has no jurisdiction to impose a tax upon the persons of non-residents.

In a certain sense of course all taxes are imposed upon persons, for it is only persons, natural or artificial, that can pay them. Property, or income, or business, or commerce, or franchises, or privileges, as such cannot pay.

No fair reading of the constitutional amendment, the statute, and the decisions can lead to any other conclusion than that the tax is what section 1 of the act declares it to be: "A tax upon income."

THIRD.

It is undisputed that the only justification for the exaction from plaintiff in error of the sum of $2,835.38 which it was compelled to pay in cash as a part of the tax levied upon its income for 1911 or for the retention by defendant in error of that sum is the claim on the part of the state of the right to tax income from interstate commerce.

In the opinion of the supreme court of Wisconsin in this case, it is admitted that the income derived by plaintiff in error from goods not manufactured in Wisconsin but purchased and sold outside of that state and amounting to $11,444.75 (see (d) and (e), ante p. 8) was not taxable under the terms of the Wisconsin income tax law. Of this income the court says in its opinion (Transcript, 43):

> "The income derived from goods which were produced and purchased outside of the state and shipped, either directly or by way of plaintiff's factory at Carrollville, to plaintiff's branch houses and thence sold and delivered to customers without the state, is clearly a separable class of plaintiff's business. Such business is transacted and located without the state, excepting incidental management from and accounting for the result thereof to plaintiff's principal office at Carrollville. The carrying on of this part of the trade, according to the findings of fact, produced an income which issued out of the business and property located without the state. Under the facts and circumstances showing the manner of conducting this part of the plaintiff's business, it must be held that the income derived therefrom is attributable to the business conducted without the state and hence not taxable under the law." (161 Wisconsin, 218-19.)

If besides the income thus held not taxable the state could not tax the income from interstate commerce, amounting to

$96,440.12, (See (b) and (c) ante p. 8) there was left of plaintiff's business income for 1911 subject to the Wisconsin income tax only the sum of $15,999.47 derived from sales within the state (see (a) ante p. 8) to which must be added $10,390.81 received from rentals, stocks, bonds, securities, etc., making a total taxable income of $26,390.28. As this amount is between 7% and 8% of $341,950.00, the assessed value of the property used in producing the income (See Transcript, p. 26, par. 13), the lawful rate of taxation thereon was 4% (see section 1087m-6.2 (a) and (g) ante pp. 4-5), and the tax $1,055.61, which was more than offset by plaintiff's personal property tax of $1,159.18.

But by taking plaintiff's entire business income, including that from interstate commerce, as the basis of computation and apportioning the same according to the rule prescribed in section 1087m-2.3 (ante p. 3) and paragraph (e) of subsection 7, of section 1770b, (ante p. 6), the tax commission in 1912 reached the conclusion that the portion of plaintiff's business income "derived from business transacted and property located within the state" was $66,576.00, and upon reassessment in 1913 concluded that the same was $86,730.00. Either of these sums is more than 12% of the assessed value of plaintiff's property employed in acquiring the income, and therefore if taxable subject to the 6% rate (see section 1087m-6, ante pp. 4-5), and plaintiff's tax was accordingly computed at that rate.

Apparently the Wisconsin Supreme Court was of the opinion that the taxability of plaintiff's income did not depend at all upon its source or the character of the business from which it was derived, but upon plaintiff's domicile, or the situs of the income after received, for in deciding this case it said (Transcript, 43):

> "The plaintiff, as recipient of its corporate income, whatever its source, has a domicile in this state, and the principal part of its property and its business which is employed in the transactions out of which the income issues is located in this state. The statute seeks to tax the part of this income which has its source in this state. The fact that the business so conducted may involve transactions in interstate commerce cannot affect the situs of the income. Nor does the fact that goods manufactured at Carrollville are sold without the state affect the source of the income. The income so derived is the result of the business carried on at Carrollville in this state. The place of sale of such products does not change the place of business from this to the state where the goods are sold. The

statute does not contemplate such a result and clearly intends that the source of the income is at the place where the business is carried on. The transactions involved in producing the products at the plant at Carrollville and disposing of them through intrastate or interstate transactions are in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. * * * The manufacture, the management, and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitute the source out of which the income issues and give it a situs within the state under the income tax law." (161 Wisconsin, 218.)

It is of course true that plaintiff is domiciled in Wisconsin, and that its income from whatever source derived when received into its treasury has a situs within that state. It is also true that it is property and viewed merely as such could be subjected to a general property tax, but as the supreme court of Wisconsin has clearly pointed out in the cases hereinbefore cited the tax here in question is not a tax upon property but a tax upon income because it is income and distinguished by the constitution and statutes of Wisconsin from property. For the reason that plaintiff's income upon which the tax involved was levied was derived from interstate commerce, the state under the constitution of the United States as expounded by this court has no power to tax it, no matter what may be its situs or the domicile of the plaintiff.

The Wisconsin Supreme Court further said (Transcript 45):

> "The laying and collecting of an income tax by a state imposes a burden on its citizens wholly unlike a tax upon their business or commerce. The tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts, or the property employed in interstate commerce. In fact the tax deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of the commerce have been discharged and such net profits are merged in the assets of the corporation." (161 Wisconsin, 221.)

The view here expressed is directly contrary to the unanimous and uniform decisions of this court holding that a tax

upon the income from interstate commerce is a burden upon that commerce.

In *Philadalphia, etc., Steam Ship Co. vs. Pennsylvania, supra,* this court said:

> "If such a tax is laid and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it." (122 United States, 342.)

This was said in disapproving one of the reasons given for the decision in the case of *State Tax on Railway Gross Receipts,* 15 Wallace, 284, which was in substance the same as that given by the Wisconsin court in the passage above quoted for its decision in the instant case.

Again in *Pollock vs. Farmers' Loan & Trust Company, supra,* this court said:

> "But if as contended the interest when received has become merely money in the recipient's pocket and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed because the source cannot be the same rule applies to revenue from any other source not subject to the tax." (158 United States, 630.)

In its opinion in this case the Wisconsin Supreme Court further said (Transcript, 45):

> "The income tax is in effect not unlike the tax which was imposed on corporations under the act of congress in the tariff act of 1909 and known as the 'Corporation Tax.' *This law imposed a tax on incomes of corporations from all sources.* In the case of *Flint vs. Stone Tracy Co.,* 220 U. S., 107, 31 Sup. Ct., 342, it was urged upon the court that this tax was invalid because the *income taxed* was in part derived from business of corporations engaged in interstate commerce. The court held that the burden imposed was '* * * a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described.' The act involved incomes derived from business transactions involving interstate commerce under the exclusive control of the federal government and from sources which were nontaxable under the constitution and laws of

the federal government, and the claim was pressed upon the court that these features of the act invalidated the tax on income derived from such sources. But the court rejected the contention, declaring:

"'It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation, as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed.' Page 165.

"We are of the opinion that the tax imposed by the income tax law of this state does not impose a burden on the business or property of plaintiff in any sense repugnant to its rights under the provision of the federal constitution conferring on congress the right to regulate commerce between the states, * * *" (161 Wisconsin, 221-2.) (The italics are ours.)

In the passages quoted, the Wisconsin court seems to have considered the corporation tax of 1909 a tax upon income and to have overlooked the distinction clearly drawn by this court in *Flint vs. Stone Tracy Company* between that tax and the one involved in the *Pollock* case, a distinction upon which the former was upheld and the latter condemned, and the Wisconsin court seems also not to have perceived that the express language of this court in the *Flint* case, including that quoted by the Wisconsin court, refutes instead of supports the inference sought to be drawn from it.

In the *Flint* case this court said:

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas case*, 192 U. S., 363, *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable." (220 U. S., 151.)

It was of this kind of a tax that this court said:

> "It is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable." (220 U. S., 165.)

But the Wisconsin income tax as hereinbefore shown is not an excise. It is a direct tax upon income, and under the decisions of this court consequently upon the property or business from which the income is derived. It follows therefore as all the decisions of this court hold and as is clearly implied in the *Flint* case that if the property or business is nontaxable, the income therefrom is equally so.

FOURTH.

The Wisconsin act is a general income tax law as we have shown. It taxes the income of those who are engaged in business and those who are not. It taxes all residents of the state, including corporations of its creation, upon all income not specifically exempted, and taxes the income of non-residents derived from sources within the state. But the fact that the law is general and lays a tax upon income within the state's power will not justify the attempt by virtue of it to tax income which is not taxable by the state. In the case of *Crew Levick Company vs. Pennsylvania, supra,* this court said of the law under consideration:

> "That it applies to internal as well as to foreign commerce cannot save it; for, as was said in *State Freight Tax Case,* 15 Wallace, 232, 277, 21 L. ed., 146, 162: 'The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state.' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." (U. S. Adv. Ops., 1917, pp. 124-5.)

In *Galveston, etc., Ry. Co. vs. Texas,* 210 U. S., 217, 228, the court said:

> "Of course, it does not matter that the plaintiff's in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state."

If the state desires to tax so much as it can of the income of persons engaged in both interstate and intrastate commerce, it must so frame and execute its laws as to segregate the former from the latter, and if this cannot be done it must forego the exercise of its right to tax, for it cannot be allowed, even in

exercising a lawful power, to invade the paramount authorit
of congress over interstate commerce.

Minnesota Rate Cases, 230 U. S., 352.
Houston, etc., Ry. Co. vs. U. S., 234 U. S., 342.
American Express Co. vs. South Dakota, 24
U. S., 617.
Railway Co. vs. U. S., 222 U. S., 20.

However, there is no reason for apprehending that exclu
ing states from taxation of incomes from interstate commer
will in any way curtail their constitutional taxing powe
There is no inherent difficulty in the separation of income fro
interstate commerce from that derived from other sources. N
such difficulty has been found in the present case, the parti
having been able to agree upon the separation. Proper a
counting can readily accomplish the same result in any cas
But if it could not, that would not justify the imposition of
state tax in violation of the federal constitution.

We submit that the judgment of the circuit court of Mi
waukee County should be reversed, and that the case be r
manded to that court with directions to enter judgment i
favor of plaintiff in error.

GEORGE LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Counsel.

MAR 18 1918
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917

No. 233.

UNITED STATES GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE TOWN OF OAK CREEK, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GEORGE LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Counsel.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917

No. 233.

UNITED STATES GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE TOWN OF OAK CREEK, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

In their brief counsel for defendant in error speaking of the division of plaintiff's income for 1911 with respect to the sources from which it was derived say: (Brief, page 6)

> "This separation which the plaintiff makes of its business into these five classes is merely a computation and an apportionment made by the plaintiff for the purposes of this case."

This is not correct. The different sources of plaintiff's income and the amount derived from each source were stipulated between the parties. (See paragraphs 7, 8, 9, 10, and 11 of stipulation, transcript, page 25.) The stipulation of facts including these paragraphs was adopted by the trial court as its findings of fact in the case (Transcript, page 37), and in its statement of the case the Supreme Court of Wisconsin again adopted and approved the same. (Transcript, page 40.) The total amount of plaintiff's income, the sources from which it was received, and the amounts received from each source, therefore, stand as verities in this case stipulated to by defendant in error and adjudicated by the state courts.

It is true, as stated by counsel (Brief page 5) that the tax commission did not have before it the classification of plaintiff's income with respect to its source which has been embodied in the stipulation and the findings and decisions of the state courts. This is because plaintiff was required by section 1087m-10.1 of the income tax act, quoted in our former brief at page 5, to make its return "in such manner and form and setting forth such facts as said commission shall deem necessary to enforce the provisions of this act." The commission had before it plaintiff's return (Exhibit 1 to stipulation, Transcript between pages 36 and 37) made in the form prescribed by the commission, and also the additional information called for by the commission and found in Exhibits 2 to 14, Transcript pages 29-36. Plaintiff was required by the statute to submit its return in such form as the commission prescribed, and it is stipulated that the plaintiff in due time complied with all the requirements of the law and of the regulations for its enforcement adopted by the commission. (Stipulation paragraph 2, Transcript 23-4.)

It is also erroneously stated in the brief for defendant in error that: "This is an action to review plaintiff's income tax assessment," (Brief page 1) and: "This action is primarily one to review the assessment and method of assessment pursued by the state tax commission," (Brief page 2). Such is not in any sense the nature of the action. The action is brought under section 1164 of the Wisconsin Statutes of 1911, which provides that:

> "Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city, or village, whether incorporated under general law or special charter, which collected such tax in the manner prescribed by law for filing claims in other cases. * * * If any town, city, or village shall fail or refuse to allow such claim the claimant may have and maintained an action against the same for the recovery of all money so unlawfully levied and collected of him."

This statute it has been expressly held by the Wisconsin Supreme Court, is applicable to the recovery of an unlawfully exacted income tax.

Montreal Mining Co. vs. State, 155 Wis. 245, 249.

Counsel for defendant in error say in their brief (pages 20, 21) it would be destructive of state income taxes to hold that because

"plaintiff sold some or most of its product in other states the state could not tax the plaintiff on its income. If such were the rule the plaintiff could *entirely escape taxation* in its home state where its business is located and the bulk of it transacted by the simple expedient of shipping all its product to branches in other states before sale, or under counsel's contention, merely by selling it all from its Wisconsin plant to buyers in other states and shipping it out in interstate commerce."

Probably counsel did not mean, what is here clearly stated, that plaintiff would be entirely free from state taxation under the circumstances mentioned, for such is not the case. Plaintiff is taxed, like all other residents of Wisconsin, upon its property, real and personal, and as the record shows in the year 1911 paid taxes to the amount of $3,222.83 upon its property used in the acquisition of its income. (See Exhibit 1 to stipulation, page 2 Transcript between pages 36 and 37.)

II.

Counsel for defendant in error admit that the tax in question is a general income tax and specifically admit that it is not an excise tax, or an occupation tax, or a privilege tax and inferentially that it is not a tax upon property (brief page 9); yet to support their contention counsel rely altogether upon decisions upholding occupation taxes, or franchise taxes, or privilege taxes, or property taxes, where either capital or income was used solely as a measure and not, as in this case, the thing itself subject to taxation. Not a single case is cited, or can be cited, where this court has upheld a state tax imposed directly as in the case at bar upon receipts or income, gross or net, derived from interstate commerce.

To be subject to taxation under the Wisconsin law the fund upon which the tax is levied must be income.

"It must be gain or profit, and it must be money or something equivalent thereto."

State ex rel Bundy vs. Nygaard, 163 Wis. 307, 310.

"From them (the words of the Wisconsin constitution) it clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state constitution. Both may be levied and lawfully levied because the constitution says so."

Income Tax Cases, 148 Wis. 456, 507.

"Since the constitution (of Wisconsin) has lawfully classified the subjects of taxation into that of property and incomes, the distinction must be observed by the courts, though logically both classes constitute property."

State vs. Tax Commission, 161 Wis. 111, 116.

The fund of $86,730.00 upon which the tax commission and the Wisconsin courts held that plaintiff must pay taxes, was not taxed because it was property of the plaintiff subject to the taxing jurisdiction of the state, but solely because it was income of the plaintiff. Our contention is that so much of this income as resulted from interstate commerce could not be taxed under the constitution of the United States, and this contention we believe is sustained by every decision of this court.

III.

To support the judgment of the state court in this case defendant in error apparently relies largely upon two propositions. These are:

1. That a portion of plaintiff's income in dispute was derived from the manufacture within the state of the goods subsequently sold in interstate commerce and a portion from the sale of the goods in interstate commerce; that the portion of the income attributable to manufacture as distinguished from sale was taxable by the state, although the portion of the income attributable to the sale in interstate commerce was not; and,

2. That in the case of a person engaged in business within and without the state the statute seeks to tax only so much of his income as is derived from business transacted and property located within the state; that some general rule is necessary for apportioning such income, and that the rule prescribed in the act fairly accomplishes this result.

We believe both of these propositions are demonstrably fallacious. As to the first it seems to us self-evident that all of the income was derived from the selling of the goods and none at all from their manufacture. In order to sell the goods and thus derive an income it was undoubtedly necessary for the plaintiff in the first place to obtain them in some manner. In the present case the plaintiff obtained its goods by manufacturing them, but from the process of manufacture alone the plaintiff received nothing. There was nothing coming in, but on the other hand a steady outgo. It cannot be denied that except for the sale of the goods after they had been manufactured there was and could have been no income. It is no doubt true that the acquisition of the goods in some manner was a necessary condition precedent to the receipt of any income from plaintiff's business, but no income was derived from the act of acquisition, nor so long as the plaintiff continued to possess and own the goods, however acquired. Acquisition of the goods in any manner could do no more than place the person acquiring them in a position to thereafter realize an income by disposing of them for more than it cost to acquire them.

A farmer who raises a crop does not thereby obtain an income. It is only when he sells that an income arises. So a miner who digs ore from the ground does not in so doing obtain an income, but only property from the sale of which an income may be gained. So a merchant who purchases a stock of goods and puts them on his shelves has not derived an income from his purchase, but has only come into possession of goods from the subsequent sale of which he may realize an income. So also a manufacturer who buys raw material, hires and pays workmen to convert it into manufactured product does not thereby realize any income, but only possesses himself in this manner of property by selling which for more than it cost to manufacture he may derive income.

In the illustrations just given, the farmer, the miner, the merchant, and the manufacturer have all transacted business and employed property in connection therewith, but as yet no income has been derived therefrom. They have received no income, but have only become possessed of property from which by the further transaction of business of a different kind, to-wit: The conversion of the property into money or its equivalent by its sale, an income or gain or profit may be realized.

The acquisition of goods by manufacture is no different from acquiring them in the manner in which the farmer, the miner, and the merchant acquire theirs. In either case there is no income until the goods are sold. Then for the first time something comes in. Manufacture like any other method of acquiring goods does no more than place the person acquiring them in a position so that by a subsequent sale an income may be obtained. It seems very clear therefore that the income is derived wholly from the business of selling and not at all from the business of manufacturing, or buying, or mining, or farming, and if this business of selling is interstate commerce the constitution of the United States prohibits a state from burdening it or the income produced by it with taxes in any form.

Whether the income of the farmer who raises and sells a crop, or the miner who digs ore from the ground and sells it, or the merchant who purchases and then sells goods, or the manufacturer who manufactures and sells his product, is as we contend derived wholly from the business of selling or partly from the acquisition of the goods by growing, mining, purchase, or manufacture, and partly from their sale, as contended by defendant in error, it must be conceded that in either case there is no income received unless and until the goods, however acquired, are sold. We think it equally plain that it is inherently impossible to frame any rule by which to separate the portion of the income due to or derived from acquisition of the goods in any of the manners above specified from that which is due to or derived from their sale, and this impossibility of separation

demonstrates to our minds that in a legal, if not in an economic sense, the income must all be attributed to the business of selling.

Whatever may be the views of economists it is certain that as respects income received upon the sale of goods, the common and ordinary understanding is that such income is derived wholly from the business of selling, and not at all from the business of acquiring the goods by whatever means such acquisition takes place. No manufacturer and no merchant considers that he has derived an income from the manufacture or purchase of goods which remain in his possession unsold, nor that any portion of the income received upon sale of the goods is derived from their acquisition, whether that was by manufacture, or purchase. It is universally understood that income of this character is derived solely from the business of selling.

Moreover the Wisconsin Supreme Court has held that the statute must be given a practical, workable interpretation, regardless of the technical, scientific meaning of its words. Thus in the case of *Van Dyke vs. Milwaukee*, 159 Wisconsin, 460, it was held that dividends of a mining company must be regarded as income of the stockholder receiving them, without tracing the dividends to their source to determine how much came from capital, and how much from income strictly speaking. In that case the Wisconsin court said: (page 463-4)

> "The subject of what constitutes income in the technical or true economic sense of the word is an interesting one, and also one upon which few economists and courts agree. Fortunately we are not called upon to enter that wide and somewhat vague field in the present inquiry. The word 'income', as used in the constitutional amendment and in the statute enacted in pursuance thereof, must be held to have been used in its common, ordinary meaning, and not in its strict, technical, or true economic sense. For it is a familiar rule of construction that ordinary words used in constitutions and statutes must be given their usual and common significance if such meaning harmonizes with the evident intent of the language employed and with the purpose to be accomplished. Ordinary dividends declared by going corporations, including mining corporations, are and always have, in the common acceptation of the term, been regarded as income, spoken of and understood to be such by people generally. It was therefore competent for the legislature to declare as income all dividends, or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous.

"To give the term 'income' its technical meaning would not only violate the evident intent of the constitutional amendment and of the legislature, but it would practically render the Income Tax Act impossible of administration. The task of tracing dividends declared by all sorts of corporations to their source to determine how much came from capital and how much from income, strictly speaking or how much from an enhancement of capital value, would be colossal in the amount of labor required, perplexing in character, and productive of almost endless litigation. No such construction should be given it unless absolutely demanded by the language of the act. On the contrary, its language requires that the word 'income' be given its general and usual meaning. It follows that ordinary dividends declared by a going corporation, including mining corporations, will be conclusively presumed, as against stockholders to be from earnings or profits for purposes of income taxation."

The same difficulties which the court declared in the *Van Dyke case* would attend an effort to trace corporate dividends to determine what portion of them was income in an economic sense and what portion a conversion of capital assets would be encountered in greater degree in any effort to apportion between the business of manufacturing and the business of selling the income received by a manufacturer upon the sale of the goods he had manufactured, for there is no fixed or determinable ratio between cost of manufacture and selling price, or between cost of manufacture and income. In the nature of the case there can be no such fixed or determinable ratio applicable generally either in the case of manufacturers or merchants. The ratio between the cost of goods, whether manufactured or purchased, and the income realized upon their sale does and inevitably must vary not only as between different branches of business, but between different persons engaged in the same line of business. It is therefore inherently impossible to lay down any general rule for the apportionment of such an income between the process or business of acquisition, whether by manufacturing or purchase, and the process or business of selling, even if it be true—which we do not concede—that any part of the income can, even in an economic sense, be said to be derived from the process or business of acquisition, and in our judgment the impossibility of working out any rule for determining how much of the income is derived from acquisition, by manufacture, or purchase is the strongest kind of proof that none of the income is so derived.

Furthermore, if it were true that the acquisition of salable goods by purchase or manufacture or otherwise may produce income in an economic sense, that species of income is not taxed

by the Wisconsin law. Under that law the income to be taxable "must be money or something equivalent thereto."

State ex rel Bundy vs. Nygaard, 163 Wisconsin, 307, 310.

This is the general rule respecting income tax legislation. This court has said:

> "Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."
>
> *Gray vs. Burlington,* 15 Wallace, 63, 66.
>
> See also *U. S. vs. Schillinger,* 14 Black., 71; 27 Fed. Cas., 973.
>
> *Tennant vs. Smith,* L. R. App. Cas., 1892, 150.
>
> Black on Income Taxes, Sec. 32.

Nor does the Wisconsin law except in one particular tax what Professor Seligman calls "enjoyable or psychic income." (Seligman, The Income Tax, 20.) Section 1087m-2.2 of the Wisconsin act in defining the word "income" declares that it shall include "all rent of real estate, including the estimated rental value of residents' property occupied by the owner thereof." The specification of this species of psychic income as being included in the act is of itself strong, if not conclusive, proof that all other income taxable under the act is money income only. *Expressio unius est exclusio alterius.* The Wisconsin court has so held in the cases cited, and the statute is perfectly clear that it is only income received, that which has actually come into the hands of the taxpayer in money or its equivalent, that is subject to tax, not anticipated or potential income.

In the case of a manufacturer or a merchant there can be no such thing as income received until the goods manufactured or dealt in are converted into cash by a sale. Until then there is at most only, as the court said in *U. S. vs. Schillinger, supra,* "the ground of expecting income" coupled it may be with the possession of goods by the sale of which income may be received. It follows therefore that in such cases the entire income, both in an economic and legal sense, is derived from the business of selling.

IV.

The second proposition above mentioned upon which defendant in error relies is that in the case of persons like the plaintiff in error engaged in business within and without the state the statute taxes only that portion of the income "derived from business transacted and property located within the state"; that some general rule is necessary for the apportionment of such incomes and that the rule or apportionment fraction prescribed in Section 1770b is a fair one for this purpose.

1. At the foundation of this proposition lies the question

whether the statute itself draws a proper line between incomes or portions of income which are taxable by the state and those which are not. The statute reads: (Sec. 1087m-2.3)

> "Any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities, or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of Section 1770b, as far as applicable."

It will be seen that the line of distinction marked by the statute takes into account only the *location* of the business, *the place where it is transacted,* and not at all its character or whether it consists in whole or in part of foreign or interstate or intrastate commerce. The decision of the Wisconsin Supreme Court in this case likewise ignores the character of the business in considering the source of income, and confines attention solely to the place where the business was carried on and the *situs* of the income after it was received.

In all of the cases in which this court has held that states could not tax income from interstate commerce the business from which the income was derived was transacted in whole or in part within the states which attempted to impose the tax. It is clear that if as we contend that portion of plaintiff's income which was derived from interstate commerce is not taxable by the state of Wisconsin, it does not help the matter any that the business which produced the income was transacted in that state, and it follows therefore that the line of distinction found in the statute between taxable and non-taxable incomes, which has regard only to the physical location and not at all to the character of the business, is not a proper one for distinguishing between that portion of an income from a business which is derived from interstate commerce and therefore not taxable by the state and that portion which is not so derived and therefore is taxable.

2. In closing their discussion of this subject counsel for defendant say:

> "The apportionment rule prescribed in the Wisconsin income tax law is less arbitrary, if indeed it can be said to be at all arbitrary, than the apportionment of property for taxation approved in"

certain cases in this court wherein the valuation of property by reference to the income therefrom was approved.

The Wisconsin court has itself characterized the apportionment rule in the first case which arose under the act, a case brought for the purpose of testing its constitutionality generally. The court said of this rule:

"The rule so imported into the statute is an arbitrary rule."

Income Tax Cases, 148 Wisconsin, 456, 516.

In the same case objection was made to the statute on the ground "that the attempt to tax a part of the profits derived from an interstate business under the rule adopted must necessarily result in a taxation of the receipts of interstate commerce, and hence a regulation thereof, which is in violation of that clause of the federal constitution which gives to congress the power to regulate commerce between the states."

148 Wisconsin, 516, 517.

Declining to decide this question and after saying that the legislature evidently intended to avoid this objection the court further said:

> "If they provided an improper rule for the division (conceding that a division can be made at all) there seems no reason why the rule may not be rejected, and the proper rule which will carry out the fundamental purpose of the provision be used." 148 Wisconsin, 517.

In the instant case, which is the only other case in which the question of taxation of income from interstate commerce has been involved and the only one in which that question has been raised by a taxpayer so as to make its decision necessary, the Wisconsin court did not attempt to justify the rule of apportionment laid down in the statute but placed its decision upon the broad ground that inasmuch as plaintiff's business was carried on within the state and its income when received had a *situs* there, it was immaterial whether the income was wholly or partly derived from interstate commerce. In our former brief we have endeavored to show that this position is wholly untenable under the decisions of this court.

3. But the rule of apportionment prescribed by the Wisconsin statute is in any aspect an illicit one for the purpose of determining even the proportion of income derived from business transacted and property located within the state and wholly inapplicable for determining how much of such income was the fruit of interstate commerce and how much was not. It was not designed for either of these purposes and cannot be made to serve them.

This rule is found in subdivision (e) of subsection 7 of section 1770b, Wisconsin Statutes of 1911, the pertinent portion of which reads:

> "In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which

the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state, added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state."

This rule was originally framed for the purpose of determining the proportion of the capital stock of a foreign corporation represented by its property and business within the state of Wisconsin and as a basis for fixing the license fee of one dollar per thousand of capital stock which such corporations are required to pay as a condition of doing business in the state, thus placing them upon the same footing as domestic corporations, which are required to pay a similar fee upon filing their articles of incorporation.

For the purpose for which it was framed, the rule works fairly well and is not unjust, for it represents a reasonably constant ratio. Generally speaking at least it is true that a corporation with a capital of one million dollars whose business transacted and property located within the state amounts to five hundred thousand dollars and whose business transacted and property located both within and without the state amounts to two million dollars has one-fourth of its capital stock represented or employed in the state. Moreover inasmuch as the state is not obliged to admit foreign corporations to do business within its borders at all, it may lawfully fix the terms of such admission and at least within certain limits prescribe an arbitrary rule for ascertaining the license fee to be paid. But when it comes to the imposition of taxes arbitrary rules are not permissible, and especially so in determining whether the subject of taxation is within or without the taxing power.

There is no established or ascertainable ratio between the amount of business transacted as expressed in dollars represented in the cost of goods manufactured or purchased and the income realized upon their sale. One person manufacturing or dealing in some specialty may realize a large income from goods procured by manufacture or purchase at comparatively small cost, while another manufacturing or dealing in a staple article may realize a smaller income from goods costing to manufacture or purchase a comparatively large amount. Neither is there any established or ascertainable ratio between the value of a person's property and the amount of his income. One person with property to the value of one hundred thousand dollars employed in his business may realize an income of twenty thousand dollars, while another may obtain no larger income from a business in which he employs property to the value of two hundred thousand dollars. As to the property element in the rule prescribed by Section 1770b, the value of

the property which is to be included in the fraction is not even confined to property used in the production of income, but embraces non-productive property as well. Of course nothing is gained by uniting two elements neither of which has a recognized or discernible ratio to income. The result must be equally irrelevant.

As a rule for determining whether the income of a merchant or manufacturer engaged in business both within and without the state is derived from interstate commerce or not, that prescribed in Section 1770b is manifestly of no value whatever for it takes no account of the character of the business but is concerned solely with its location and volume.

4. The inapplicability of the rule as enacted in the income tax law of 1911 was soon recognized by the legislature of Wisconsin which in 1913 amended the statute so as to read:

> "Persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state *which may be determined by an allocation and separate accounting for such income, when made in form and manner prescribed by the tax commission,* but otherwise shall be determined in the manner specified in subdivision (e) of subsection 7 of section 1770b of the statutes, as far as applicable."

By this amendment the original rule becomes secondary to be resorted to only when the apportionment cannot be made "by an allocation and separate accounting" as was done in the present case.

But the amended rule as well as the original fails to take into account in any degree the character of business producing income and therefore is unsuited for ascertaining how much of the income was derived from interstate commerce.

This amendment of the apportionment rule was adopted before the trial of the present case, and as we have said the rule as amended was entirely ignored by the Supreme Court of Wisconsin in deciding this case.

V.

Counsel for defendant in error rely much upon the case of *Ficklen vs. Shelby County,* 145 U. S., 1. Of that case they say: (Brief, page 41)

> "The tax there, as here, was upon the income." "The tax there was on gross income, whilst here it is on the net only."

The tax in the *Ficklen case* was not a tax upon income at all, but a tax upon the occupation, and was measured primarily by the capital invested, and secondarily, in case of no capital,

by commissions received. It was a license tax imposed at the beginning of the year for the privilege of engaging in the specified business during the year and it was upheld as such.

Counsel for the commonwealth in *Crew Levick Company vs. Pennsylvania* also relied upon the *Ficklen case*, but this court held it to be distinguishable, and we think it is equally distinguishable from the case at bar and upon the same grounds expressed in the opinion in the *Crew Levick Company case*.

We submit that the judgment of the state court should be reversed.

GEORGE LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Counsel.

INDEX OF CONTENTS.

	Page
Statement of the Case	1
Argument	8
The tax here involved is one upon the net income of a resident corporation	10
The source of the income is the business as a whole and is not in the mere sale of the product whether sold within or without the state	15
Where, as here, the business is conducted as a unit largely within the state but partly outside, the state is entitled to and may make a fair apportionment	20
The tax being upon a subject matter within the jurisdiction of the state, it is no objection that the measure of it may include reference to subject matter not taxable by the state	25
The tax is not on interstate commerce or on any commerce and touches commerce, if at all, only remotely and incidently and in no manner in contravention of the Commerce Clause	29

INDEX OF CASES.

	Page
Anderson vs. 42nd Broadway Co., 239 U. S. 69, 73	11
Adams Express Co. vs. Ohio, 165 U. S. 194	25
Atlantic & Pac. Tel. Co. vs. Phil., 190 U. S. 160	33
Brushaber vs. Union Pac. R. Co., 240 U. S. 1, 23	11
Black's Income Tax, 73	15
Baltic Mining Co. vs. Mass., 231 U. S. 68	26
Crew-Levick Co. vs. Penn., 38 Sup. Ct. Rep. 126	14
Cleveland Ry. Co. vs. Bachus, 154 U. S. 438	26
Dowell's Income Tax Laws (Butterworth & Co., London, 1913 Ed.) Sections 100, 106, 108	18
Denver Hotel Co. vs. Andrews, 11 T. R. L. 238, 3 Taxes Cases 356	19

DeBeers Cons. Mines vs. Howe (1906), A. C. 455, 5 Tax Cases 198 20
Delaware Ry. Tax Com., 18 Wall. 206, 231-232 25
Diamond Glue Co. vs. U. S. Glue Co., 103 Fed. 838 29
Flint vs. Stone-Tracy Co., 220 U. S. 107, 162, 165 26
Ficklen vs. Shelby County, 145 U. S. 1 31
Gloucester Ferry Co. vs. Penn., 114 U. S. 196 31
Horn-Silver Mining Co. vs. N. Y., 443 U. S. 305, 317-18. 26
Home Ins. Co. vs. N. Y., 134 U. S. 594 32
Income Tax Cases, 148 Wis. 456, 513 10
Kansas, etc., Ry. Co. vs. Botkin, 240 U. S. 227, 232 25
Kansas City M. & B. R. Co. vs. Stiles, 242 U. S. 111, 119 25
Loan Assn. vs. Topeka, 20 Wall. 655 26
London Bank of Mexico vs. Apthorp, 2 Q. B. D. 378, 3 Tax Cases 143 20
Method of Computing Tax under Law 5
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217 25
Noble Dynamite Trust Co. vs. Wyatt, 2 Q. B. 499, 3 Tax Cases 224 19
New Zealand Shipping Co. vs. Stevens, 96 L. T. R. 50, 5 Tax Cases 553 20
N. Y. Life Ins. Co. vs. Deer Lodge Co., 231 U. S. 495 .. 29
Pullman Palace Car Co. vs. Penn., 141 U. S. 18 31
Phil. S. S. Co. vs. Penn., 122 U. S. 326, 345 39
State, ex rel. Manitowoc Gas Co. vs. Wis. Tax Comm., 161 Wis. 111 10
State, ex rel. Bundry vs. Nygaard, 163 Wis. 307 10
Stanton vs. Baltic Mining Co., 240 U. S. 103 11
Stratton's Independence vs. Howbert, 231 U. S. 399 12
Sulby vs. Atty. General, 5 H. & N. 711, 2 Tax Cases 149 18
San Paulo Ry. Co. vs. Carter, 1 Q. B. 580, 3 Tax Cases 344, 407 19
St. Louis & S. W. Ry. Co. vs. Arkansas, 235 U. S. 350, 365 25
U. S. Glue Co. vs. Oak Creek, 161 Wis. 211 10
U. S. vs. Knight Co., 156 U. S. 1 29
U. S. Express Co. vs. Minn., 223 U. S. 335, 342 31
Von Baumbach vs. Sargent, 242 U. S. 503, 525 11
Van Dyke vs. Milwaukee, 159 Wis. 460 23
Vaeale vs. Moor, 14 How. 568, 574 29
Wilcox vs. Middlesex, 103 Mass. 544 15
Wis. & Mich. Ry. Co. vs. Powers, 191 U. S. 379 25
Wiggins Ferry Co. vs. St. Louis, 107 U. S. 365 34
Western Union Tel. Co. vs. Mass., 125 U. S. 530, 550 .. 31

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

NO. 233.

UNITED STATES GLUE COMPANY,

Plaintiff in Error,

vs.

THE TOWN OF OAK CREEK,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

The statement of the case on the brief for the plaintiff in error [1] in stating, as the case brought here by this writ of error, primarily those matters upon which the plaintiff's contentions are made, falls short, in our opinion, of putting the real case before the Court. While the lapse on the part of counsel is doubtless inadvertent, we feel constrained to correct it in order that case be presented squarely and front-foremost for consideration by the Court and also that the defendant in error [2] be not held, under the rule, by silence to have agreed to their statement.

This is an action to review plaintiff's income tax assessment, as assessed by the Wisconsin State Tax Commission, on plaintiff's income for the year 1911 and to recover the tax paid thereon, January 29, 1913, upon the ground that such assessment included income not taxable by the

state and that the tax was, therefore, unconstitutional and void. The constitutional provision relied upon is the Commerce Clause, Section 8, Article 1, of the Constitution.

[1] Hereinafter referred to as the "plaintiff."

[2] Hereinafter referred to as the "defendant."

Plaintiff claims that the tax which it was compelled to pay pursuant to such assessment was in fact a tax upon interstate commerce. As counsel state (Plaintiff's brief, bottom page 10), this interstate commerce question is the only question saved and presented here by the assignment of errors.

The statement of the Wisconsin Income Tax Act, Chap. 658, Laws of 1911, on the brief for plaintiff is sufficient for this case, except that it should probably be explained that under the act all corporations are required to make their reports to the State Tax Commission and their taxable income and amount of tax is determined and assessed by that body and by it certified to the respective county clerks of the counties wherein the several corporations are domiciled. The county clerk in turn is required to place the tax for each corporation so certified on the proper tax roll for the town, city or village in which the corporation is domiciled. In the instant case the defendant was simply the town in which the plaintiff corporation is domiciled and had nothing to do with the determination or assessment of the tax but was concerned directly in the collection of it and is largely the beneficiary of it in that it retains the major portion of the amount collected for local purposes.

This action is primarily one to review the assessment and method of assessment pursued by the State Tax Commission. At the threshold of our inquiry here should be consideration of the rule or law which the Tax Commission followed and the manner in which they determined the plaintiff's taxable income.

As appears by the complaint (Trans. pp. 9-12), the answer (Trans. p. 20-22) and the agreed facts and exhibits (Trans. p. 23) that the plaintiff is a "person engaged in business within and without the state" and so within the terms of sub-section 3 of section 1087m-2 of the Income Tax Act, as quoted at page 3 of plaintiff's brief which provides:

> "Any person engaged in business within and without the state shall with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of Sec. 1770b, as far as applicable."

Section 1770b is the state statute, as counsel state at page 6 of their brief, relating to the licensing of foreign corporations to do business in the state, and subdivision (e) is a rule of apportionment therein prescribed for the purpose of measuring the Wisconsin license fee upon a proportion of the capital of the corporation in proportion to its property and business in the state. The rule of apportionment there prescribed is as follows:

> "In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state, added to the full value in dollars of the entire property of the corporation both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state."

This is the rule which the Tax Commission applied to

the apportionment of the plaintiff's so-called net business income to Wisconsin in making the assessment here drawn in question. There is no controversy as to what was the total amount of plaintiff's gross income or of the deductions allowable therefrom or as to the amount of plaintiff's net business income. The controversy is simply as to what part of this net business income amounting to $123,884.34 was subject to income taxation by Wisconsin.

There was originally a controversy growing out of plaintiff's claimed deduction from gross income on account of depreciation of its plant and buildings which claim the Tax Commission, in making the original assessment in 1912, regarded as excessive and disallowed in part, but after further investigation allowed in full in its re-assessment in 1913 and placed the plaintiff's net business income at the figure $123,884.34 as computed by the plaintiff in its original return, Exhibit 1 (Trans. following p. 36), item D. p. 2 of the exhibit (Stipulation paragraph 21, Trans. pp. 26-28).

In making this re-assessment, however, the commission apportioned a larger part of its net business income to Wisconsin than it had in the original assessment of 1912 so that, although plaintiff's claim for depreciation was allowed in full, the taxable income was increased $13,344.00 and the tax thereon increased $700.64. This increase resulted from the Commission's including in the numerator of the fraction as "business transacted" in Wisconsin, in addition to the value of goods sold within the state, the value of goods *manufactured* but not sold in the state, which had not been done on the original assessment (Trans. pp. 27-28, 31-32, 35-36). This operated to increase the apportionment fraction to 70 per cent, as the percentage of plaintiff's net business income held subject to the tax, and to increase the amount to $86,730.00. This fraction was made up as follows:

Numerator—		
Property in the state	$	717,225.51
Sales in the state		165,223.38
Value products manufactured but not sold in the state		731,123.98
Total numerator		$1,613,572.87
Denominator—		
Total property within and without the state		$1,024,943.90
Total business (sales) within and without the state		1,279,850.77
Total denominator		$2,304,794.67

$1,613,572.87=70% ×

$2,304,794.67

(Trans. p. 27-28, 35-36.)

It will be observed that what the Commission had before it was the income of the corporation derived from a business conducted as a unit, within and without the state, which income was reported by the plaintiff to the Commission as the income for and from the business as a whole. (Exhibit 1, Trans. following p. 36.) What the Commission sought to do and, conformably to the provisions of the statute, did do was to ascertain and assess of such reported income, in the language of sub-section 3, Sec. 1087m-2 "that proportion of such income as is derived from business transacted and property located within the state." This it did upon the rule of apportionment prescribed by the statutes, taking the items of the apportionment fraction as furnished to it by the plainiff in its letter to the Commission dated October 3, 1913 (Trans. p. 34-35).

The Commission did not, as might be thought from the statement of the case on plaintiff's brief (page 8), have before it for assessment the income of five different businesses or five different classes of business, one (a) from

within the state, three (b) (c) (d) interstate and one (e) wholly without the state, conducted separately or reported separately to the Commission. This separation which the plaintiff makes of its business into these five classes is merely a computation and an apportionment made by the plaintiff for the purposes of this case. In a business conducted as an entirety there is, of course, no such thing as a separate net income of business from certain sales or classes of sales. These amounts of alleged net income from these several classes or parts of plaintiff's business are merely *"each calculated and determined by apportioning* the total net income of the plaintiff from its business and operations for said year to said several classes of business mentioned * * * in proportion to the business income from said several classes of business," i. e. in proportion to the gross amount of sales in each class.

In the case of a corporation such as the plaintiff the net business income is derived from many sources and is naturally the composite result of several factors and elements. It is a thing whole. Nevertheless it is attributable to sources some within and some without the state. In order to avoid injustice, to avoid a tax upon that which some other state may have and assert the right to tax, the law declares its purpose and endeavors, at least, to tax only so much of the income as attributable to sources, property employed and business transacted, within the state. To accomplish this purpose, obviously, *some rule* of apportionment must be employed. The statute prescribed and the Tax Commission followed one such rule based upon the factors of property and business transacted. The plaintiff has employed for the purpose of this case a different rule of apportionment, one in which the income is apportioned *solely with reference to sales* made within or without the state.

Because the income apportioned to the state and assessed by the Commission is found to include income

which, under plaintiff's method of apportionment, is attributed to sales made in interstate commerce, plaintiff claims the tax is a tax upon interstate commerce and unlawful under the Commerce Clause.

The state court however, passing this question of apportionment, dealt with the plaintiff's buisness as it is attempted to be classified in this action. It held that the entire net income from the business, excepting the last two classes of the business, consisting of goods purchased without the state and sold without the state either being distributed through the plaintiff's factory to its branches outside of the state or shipped directly from the place of purchase to the branches without the state and sold and distributed from such branches, constituted business transacted within the state. As these two classes produced only $6,894.68 and $4,550.07 of the net business income of $123,-884.34, or less than 8% of the total, it followed, on this view of the case, that plaintiff had no cause of action on account of apportionment by the Tax Commission of 70% of its net business income to the state. In its opinion the state court said:

> "The plaintiff, as recipient of its corporate income, whatever its source, has a domicile in this state, and the principal part of its property and its business which is employed in the transactions out of which the income issues, is located in this state. *The statute seeks to tax the part of this income which has its source in this state.* The fact that the business so conducted may involve transactions in interstate commerce cannot affect the situs of the income. Nor does the fact that goods manufactured at Carrollville are sold without the state affect the source of the income. *The income so derived is the result of the business carried on at Carrollville in this state. The place of sale of such products does not change the place of business from this to the state where the goods are sold.* The statute does not contemplate such a result and clearly intends that the source of the income is at the place where the business is carried on. The transactions involved in

producing the product at the plant at Carrollville and disposing of them through intra or interstate transactions is in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses, to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. We cannot, *in the light of the nature of the general conduct of the business, assent to the claim that the shipping and delivery of goods, manufactured at the plant, from branch houses are the controlling elements of such transactions and that they give such business a situs without the state. The manufacture, the management and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitutes the source out of which the income issues and gives it a situs within the state under the income tax law.*

The income derived from goods which were produced and purchased outside of the state and shipped, either directly or by way of plaintiff's factory at Carrollville, to plaintiff's branch houses and thence sold and delivered to customers without the state is clearly a separable class of plaintiff's business. Such business is transacted and located without the state, excepting incidental management from and accounting for the result thereof to plaintiff's principal office at Carrollville. The carrying on of this part of the trade according to the findings of fact produced an income, which issued out of the business and property located without the state. Under the facts and circumstances showing the manner of conducting this part of the plaintiff's business, it must be held that the income derived therefrom is attributable to the business conducted without the state and hence not taxable under the law." (Trans. p. 43.)

ARGUMENT.

We will not argue with counsel for the plaintiff the exclusive power of Congress to regulate commerce among the several states and with foreign nations. We concede,

of course, that the state may not tax interstate commerce. The authorities which counsel cite to support those propositions are really beside the point in this case. Nor would we make any contention, were the tax here upon interstate commerce, that the fact that it is also upon intrastate commerce would save it from judicial condemnation. But this, too, is beside the point because the tax is not upon commerce at all, state or interstate. It is not an excise tax, an occupation tax or a privilege tax. It is a general income tax.

We contend—

I.

The tax here involved is one upon the net income of a resident corporation.

II.

The source of the income is the business as a whole and is not in the mere sale of the product whether sold within or without the state.

III.

Where, as here, the business is conducted as a unit, largely within the state but partly outside, the state is entitled to and may make a fair apportionment.

IV.

The tax being upon a subject matter within the jurisdiction of the state, it is no objection that the measure of it may include reference to subject matter not taxable by the state.

V.

The tax is not on interstate commerce or on any commerce and touches commerce, if at all, only remotely and incidentally and in no manner in contravention of the Commerce Clause.

I.

THE TAX HERE INVOLVED IS ONE UPON THE NET INCOME OF A RESIDENT CORPORATION.

The plaintiff is a domestic corporation having its manufacturing plant and its principal place of business in the town of Oak Creek in Milwaukee County. It has property there of a value of upwards of $700,000.00, being over 70% of all its property. There it manufactured all the goods sold by it, with the exception of something less than 10% of goods bought merely for purposes of re-sale. Plaintiff's business is obviously and predominantly a manufacturing business, not a commercial enterprise. But even its commercial business, or the *commercial incident* of its business, as well as its manufacturing business, is managed and directed from its home office in Wisconsin.

The tax is not as counsel suggest a tax on gross income but, on the contrary, is, by the statute and by the decisions of the state court in this and other cases before it, a tax upon net income.

Income Tax Cases, 148 Wis. 456, 513;
U. S. Glue Co. vs. Oak Creek, 161 Wis. 211, 221;
State ex rel. Manitowoc Gas Co. vs. Tax Commission, 161 Wis. 111, 116;
State ex rel. Bundy vs. Nygaard, 163 Wis. 307, 310.

While the statute proceeds in the manner of declaring

the tax upon "all income," "gross income," as counsel call it, and providing for and specifying deductions of expenses incurred in producing the income, instead of merely declaring the tax upon net income, the difference is principally of form merely. The form of the statute is one preferred with a view to preventing evasion of tax by under statements of income. That there may be in exceptional cases, minor items of expense which technical accuracy and scientific accounting would deduct in arriving at net income, for the deduction of which the statute does not provide, is no objection.

This is no less a tax upon net income than the Federal Corporation Tax which proceeded in the opposite manner, by declaring the tax upon net income and then declaring the deductions from gross income which shall be made in arriving at net income and so limiting the deductions as not to allow in some cases the deduction in full of interest or other items which correct accounting or true economics would hold should be deducted in arriving at net income,

Anderson vs. Forty Two Broadway Co., 239 U. S. 69, 73,

or than the Federal Income Tax, which proceeds in the same manner:

Brushaber vs. Union Pacific Ry Co., 240 U. S. 123;
Stanton vs. Baltic Mining Co., 240 U. S. 103, 113;
Von Baumbach vs. Sargent, 242 U. S. 503, 525.

Practically and substantially, and so far as appears in this case, strictly, *the tax is upon net income.* This appears from the plaintiff's statement, Exhibit 1 (Trans. following p. 36). Here the gross income (Ex. 1, p. 2, item A) is $1,289,719.16; the total deductions, *including all wages and salaries, amounts paid for materials and goods, for repairs, for rent of business premises, depreciation, miscellaneous,* losses, and taxes paid (Ex. 1, p. 2, item B) is $1,155,444.01, leaving the *net income* $134,275.15. This includes $10,-

890.81 from rentals and interest on securities within the state, about the taxability of which item there is no controversy, leaving the item (Ex. 1, p. 2, item D) "net income to be apportioned," $123,884.34. If there is any item of expense or disbursement involved in the production of this income which is required to be deducted, in order that the strictly net income may be derived, the nature and amount thereof is not suggested by the record in this case.

As was said by the Court below in its opinion in this case (italics ours):

> "The tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts, or the property employed in interstate commerce. In fact the tax deals only in that part of the fruits of such commerce which remains as the *net proceeds* after all the immediate burdens of the commerce have been discharged *and such net profits are merged in the assets of the corporation.*" (Trans. p. 45; 161 Wis. 221.)

In the *Manitowoc Gas Case, supra,* the state court said:

> "The income tax law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state." (161 Wis. 115.)

and in the *Nygaard Case,* the Court held that an advance in price which the taxpayer had received during the year from the sale of stocks, which had not increased in value during the period of the act, was not subject to tax, giving to the word income in the act the following definition (italics ours):

> "In brief, it may be said to be the *profit* or *gain* derived from capital or labor combined." Citing *Stratton's Independence vs. Howbert,* 231 U. S. 399; *Income Tax Cases, supra* (163 Wis. 310).

The tax here is only upon the net income of the plaintiff after it has come into the possession of the plaintiff

and become a part of its assets within the state and after all the expenses of conducting the business in which it is acquired have been paid. This is well illustrated in this case. Here the business of the plaintiff for the year 1911 is reported to the State Tax Commission and the net income for that year is determined. The report thereof is not made to the Tax Commission until the year 1912. After the report is made the taxable income is determined and assessed. The tax thereon is paid in 1913. The tax is not measured upon the value or receipts of commerce directly at all. Payment of it is not made a condition of the right to engage in commerce. Plaintiff's obligation to pay this tax in 1913 arises solely from the fact that as a domestic corporation it had received and acquired into its possession, as money in pocket at its domicile within the state, this net income, the source of which is a manufacturing business conducted as a unit and substantially within the state.

The tax here is not in any view one upon an instrumentality of the Federal Government and *M'Culloch vs. Maryland,* 4 Wheat. 316, cited by counsel, has no application.

It is not a tax upon the salary of an officer of the Federal Government and therefore, the principle of *Dobbins vs. The Commissioners of Erie County,* 16 Peters, 435, and of *Collector vs. Day,* 11 Wall. 113, is not involved.

It is not a license tax or occupation tax imposed as a condition of the right to engage in interstate commerce as was the tax involved in *Robbins vs. Shelby Taxing District,* 120 U. S. 489.

The tax here has nothing in common in its character or incidence with the tax in *Cook vs. Pennsylvania,* 97 U. S. 566, cited by counsel, which was a tax of mixed character being in part an occupation tax on auctioneers and in part a state *duty on sales,* of imported merchandise.

Nor is it a tax upon an agency of commerce or upon

the receipts of an interstate carrier and, therefore the cases of that class cited by counsel are not in point.

Postal Telegraph Cable Co. vs. *Adams*, 155 U. S. 688;

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196;

Ratterman vs. *Telegraph Co.*, 127 U. S. 411;

Telegraph Co. vs. *Alabama*, 132 U. S. 472;

Oklahoma vs. *Wells Fargo Express Co.*, 223 U. S. 298;

Philadelphia & S. M. Steamship Co. vs. *Pennsylvania*, 122 U. S. 326.

The recent case of *Crew Levick Co.* vs. *Pennsylvania*, U. S. Adv. Ops. 1917, p. 122, which counsel say "is decisive of the one at bar," is plainly distinguishable. That case dealt with a tax directly on commerce—on merchandising, not with a general tax such as this here, affecting all persons regardless of their business or occupation. The amount of the tax there was directly upon the gross value of business transacted. In the Pennsylvania Act, the class subject to the tax was defined as "each retail vendor of, or dealer in goods" or "wholesaler." The tax, in addition to a nominal fixed sum of $3.00, was fixed at "one-half mill additional on each dollar of the whole value, gross, of business transacted annually." In the case before the court the plaintiff in error was a wholesaler and the tax had been imposed at this rate *upon the gross value of his sales* of which only $47,000 were within the state and the bulk, $430,000, *to customers in foreign countries*. The question as there stated by the Court was:

> "The bare question, then, is whether a state tax imposed upon business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports within the meaning of the pertinent clauses of the Federal Constitution."

In denouncing the tax the Court said (italics ours):

"It bears no semblance of a property tax or a franchise tax in the proper sense; nor is it an occupation tax except as *it is imposed upon the very carrying on of the business of exporting merchandise.* It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, *a part of every dollar received in such transactions.*"

Such a tax finds no parallel in the Wisconsin Income Tax Law.

II.

THE SOURCE OF THE INCOME IS THE BUSINESS AS A WHOLE AND IS NOT IN THE MERE SALE OF THE PRODUCT WHETHER SOLD WITHIN OR WITHOUT THE STATE.

"Income is the creation of capital, industry and skill. It is the *net result of capital invested, personal labor, skill and ability, carefulness, good judgment* and *foresightedness.*"

Wilcox vs. Middlesex, 103 Mass. 544.

"It is the gain that proceeds from labor, business, property or capital."

Black's "Income Tax," page 73.

The Wisconsin Statute does not define income, but 1087m-2 (2) designates out of what income shall issue. Generally speaking, it is income arising out of land, capital invested, business and services. The tax is imposed on the income received after the deductions prescribed by the statute have been made. The income is in the hands of the resident under the absolute jurisdiction of the state.

It is contended by plaintiff that the manufacture of goods by the plaintiff, a Wisconsin corporation, does not produce income—that income results ONLY from the *busi-*

ness of selling and from no other source. To sustain plaintiff's contention in this case the Court must necessarily hold that income, as used in the Wisconsin statute, must result *wholly and entirely from the sale of goods.*

If plaintiff's contention was true, the definition of "income" should read, "Income is that which is received from sales" or "Income is the immediate and direct return from the act of selling." It is readily seen such a definition would be erroneous, if not ridiculous. The meaning of "income," as understood and considered by the Wisconsin statute, is "The creation of capital, industry and skill."

The act of selling is only the final act in the ultimate production of income, but *capital, industry* and the *various other elements* that enter are as equally potent and instrumental in its production as the act of selling. Gross receipts are the immediate and direct result of the act of selling, and that is what the plaintiff's definition of income would mean; but the tax imposed by this statute is not upon gross receipts. It is, however, a tax upon income after the expenditures necessarily incurred in the production and distribution of the goods have been deducted. So far as it can be done, this statute provides a means to make this tax one on gains and profits, and not on gross receipts. It cannot be successfully claimed that profits and gains are the result alone of selling. All that is derived from the act of selling is not taxed under this statute; it is only that which remains after the cost of production and sale has been deducted. In other words, it is the *profits that are taxed,* and profits are the result of *skill, industry, labor* and *capital,* which are the factors that produce income, and not the mere act of selling. The statute in question provides that where the deductions exceed the profits, no tax shall be assessed; however, if the plaintiff's contention should prevail that income is derived from the act of selling alone, a tax should be paid on the amount sold irrespective of profit or loss.

The tax provided for in this statute is not a tax upon receipt, but a tax upon that *which remains after the deductions of Section* 1087m-3 (*a, b, c, d, e*) *have been made.*

It is admitted that manufacture in the case at bar is a condition precedent to the receipt of any income. This being so, it follows, of course, that it was instrumental in the acquisition of the income; without it there would have been no sale and no income. It is true that the exchange of values in the form of money is through the process of selling, but the act of selling is a mere incident growing out of the real producing cause—manufacture. Selling brings in the actual cash and is the last step in the acquisition of income, but skill, industry, labor and capital combined produce value before the act of selling can take place.

While it may be true that manufacture only gives future value, this tax is not levied until such value has been realized. The element of futurity has been eliminated. The value of the present in the form of income is taxed. The statute provides:

> "Income or profits earned during the business year."

Earned, as here used, means that which has been acquired. Again the statute says, 1087m-10-1:

> "Income received during the preceding calendar year."

This conception of the sources of income is, moreover, accepted by the supreme court of Massachusetts, in which jurisdiction income taxes have been in force for nearly three centuries—longer than in any other jurisdiction in which they are now in force.

Wilcox vs. County Commissioners, supra.

It is idle to contend that commercial transactions, sales, are the only source of income. If manufacturing, for example, did not produce income, i. e., gains or profits, men would not invest their capital and devote their time and

skill to that business. If plaintiff's manufacturing did not contribute to its profits, its income, it would not manufacture, it would buy and sell, only.

Schedule D of the British Income Tax Act of 1853 measures the income tax of that country as to British subjects upon net income from whatever source, and upon foreigners upon net income from "any profession, trade, employment or vocation exercised within the United Kingdom." For purposes of administration this tax is determined according to six cases, so-called, or classes. The first case is that which measures the tax upon the balance of profits or gains of subjects or residents of Great Britain engaged in carrying on business or profession therein. The second case applies to residents of foreign countries or British Colonies carrying on trade in Great Britain, and the fifth case applies to gains received by residents of Great Britain from business carried on wholly outside of the Kingdom.

Dowell's Income Tax Laws (Butterworth & Co., London, 1913 ed.), Secs. 100, 106, 108.

It has become necessary, in the administration of this act, to consider and determine what are the sources of gains and profits, i. e., income, and the view which there obtains as to what are sources of income is similar to that expressed by the Massachusetts court in *Wilcox vs. Commissioners, supra*, i. e., that the income is not attributable merely to sales or any particular class of transactions, but really to the business as a whole, or at least to the principal conduct and administration of the business, such as is conducted at its home office, the place where the taxpayer's "profits come home to him."

Sully vs. Attorney General, 5 H. & N. 711, 2 Tax Cases, 149.

The case of *San Paulo Ry. Co. vs. Carter* (1895), 1 Q. B. 580 (1896), A. C. 31, 3 Tax Cases 344 and 407, is a significant expression of the view that the income is attributable to the entire business. This was a case of railway company owned in Great Britain and with managing offices in London, but with all physical properties and operation conducted in Brazil. It was contended by the company that it was not carrying on trade within Great Britain and not subject to tax as such, i. e., that the company would come under the fifth case and be taxable only upon the profits transmitted to Great Britain, whereas if the company were engaged in trade in Great Britain it would be taxable under the first case upon all profits earned. The court reached the conclusion:

> "The carrying on of the whole trade is what earns the profit, if there is any profit; if there is no profit, *cadit quaestio*, and it is not within the income tax acts at all and there is nothing to be dealt with. The statute does not say where the profits are earned—it says where the trade is carried on. Therefore you have a trade carried on which produces a profit; it is the trade which produces the profit, whole trade."

It was contended that the buying of materials, which plaintiff here would contend occasioned outgo and not income, was no part of the business for the purpose of measuring the tax, the purchase of supplies being, in that case, made at the London office. The court said:

> "I can only say that such arguments are brought forward in the stress of the case because to ask people to say that the buying of materials is not a part of the business, and, in most trades, is not the principal part of the business, is a proposition which we cannot accept."

And accordingly the court held the San Paulo Railway Company taxable under the first case as carrying on trade in England. See also *Denver Hotel Co. vs. Andrews*, 11 T. L. R. 238, 3 Tax Cases 356; *Noble Dynamite Trust Co.*

vs. Wyatt (1893), 2 Q. B. 499, 3 Tax Cases 224; *London Bank of Mexico vs. Apthorp* (1892), 2 Q. B. D. 378, 3 Tax Cases 143; *De Beers Cons. Mines vs. Howe* (1906), A. C. 455, 5 Tax Cases 198; *New Zealand Shipping Co. vs. Stephens*, 96 L. T. R. 50, 5 Tax Cases 553.

Under the principle of these cases it is very clear that the management of the business from the home office is regarded as an important if not controlling factor in the production of income, quite regardless of whether the receipts of the business may come to the hand of the taxpayer or its agent.

The logic of these cases, as it seems to us, applied to the case at bar, is this, that the plaintiff being domiciled in the state, having there its principal place of business, having there its large investment in manufacturing plant and carrying on there all of its manufacturing business, producing there at its manufacturing plant over ninety per cent of the entire product which it sells or handles and selling there a substantial portion of its product, must be conceded to be engaged in business principally in the state, and the major portion of its net income, determinable only by some fair and proper method of apportionment, must be regarded and treated as derived from sources within the state.

III.

WHERE, AS HERE, THE BUSINESS IS CONDUCTED AS A UNIT, LARGELY WITHIN THE STATE BUT PARTLY OUTSIDE, THE STATE IS ENTITLED TO AND MAY MAKE A FAIR APPORTIONMENT.

The state affords the protection of government for the bulk of plaintiff's business activities. It has jurisdiction of the plaintiff, of the bulk of its property and jurisdiction of its net income. It would be destructive of all state income taxation to hold that, merely because, in the conduct of that business and the acquisition of the income, plaintiff

sold some or most of its product in other states, the state could not tax the plaintiff on its income. If such were the rule the plaintiff could entirely escape taxation in its home state, where its business is located and the bulk of it transacted, by the simple expedient of shipping all its product to branches in other states before sale or under counsel's contention, merely by selling it all from its Wisconsin plant to buyers in other states and shipping it out in interstate commerce.

To so hold would result in such gross and intolerable injustice and inequality as between residents of the state, some of whom could and some of whom could not avail themselves of such avenue of escape from the tax, that the tax would become disreputable and impossible. It would be to deprive the state in a large and unwarranted degree of its sources of revenue for the support of government. In the system of taxation in Wisconsin income taxation has been substantially substituted for general personal property taxation and constitutes a major item of the public revenue. Every consideration upon which the states are permitted to apportion and tax property employed partly in interstate commerce supports equally the right to apportion the income of a resident corporation, although some part of its business may be interstate commerce.

Assuming, but not conceding, that the tax is in law a tax upon the income and hence upon the source of the income; i. e., the business transacted and the property owned, still the statute, by express design and provision, excludes the taxation of any income derived from interstate or foreign business. It does this by general rule. Such general rule is indispensable. To determine the precise income which, in each instance of a person or corporation engaged in business within and without the state, is derived only from sources within the state would be so difficult and so generally impossible as to render the act unenforcible.

A general rule, therefore, of apportionment is requisite and is justified by the necessities of the case. Such general rule, *being manifestly in good faith established for the purpose of determining that part of the income which is derived from sources within the state and being a rule which*, in general and within reasonable variation, *accomplishes that result*, will be permitted and sustained.

We maintain that, accurately speaking, no actual or natural allocation of any part of the net income of plaintiff's business for the tax year to any particular transaction or class of transactions or department of the business is possible. Plaintiff's attempt and assumption to so allocate and distribute its net earnings to the five classes of its business, as made upon the stipulation, is an apportionment only. (See Par. 12, Stipulation, Trans. p. 27.)

While it is conceded that plaintiff's witnesses, if called, would testify that the net earnings of the plaintiff from each class of business were "substantially in proportion to the gross receipts," it is, of course, perfectly obvious that this would be an expression of judgment merely and would involve inevitably several preliminary apportionments, as for example of overhead expenses and other items of expense chargeable to more than one transaction or class of business. It would necessarily also involve a judgment as to whether any of the net income is to be ascribed to the manufacturing business, to successful or profitable purchases of raw materials and to capital invested in the manufacturing department.

It being conceded, as we submit it must be, that measurement of the tax upon a part of the income from a business which is conducted as a unit makes apportionment inevitable, *it was within the province of the legislature to determine and prescribe, within the reasonable exercise of its discretion and judgment, the rule of apportionment.* The rule of apportionment prescribed by the legislature being the result of practical experience and expressive of

the accepted idea of the business world that income is the product not merely of sales but of the combined forces of capital, labor, skill and business done, will not be set aside upon the suggestion that some other rule of apportionment might, in a particular case, more accurately apportion income to the classes of transactions out of which it is derived.

In *Van Dyke vs. Milwaukee*, 159 Wis. 460, the State Supreme Court sustained the general rule of the statute for the determination of net income, although it was admitted that such net income in a case such as that presented might not be technically and exactly net income. In that case, the "income" was in the form of dividends upon stock and interest upon bonds. One contention was that the dividends were not earnings of the corporation, but were paid out of capital and that the stockholder, therefore, received in fact no income, but merely a partial return of his capital invested in the stock of the corporation.

The Court held that dividends received on corporate stock would, for purposes of this law, be held, *in accordance with the usual general practice and understanding*, to have been paid out of profits regardless of the actual fact.

With reference to interest on bonds, the claim was made that, as the bonds were purchased at a premium, the taxpayer should be allowed to deduct, in reporting his income, from the interest received a pro rata amount of the premium paid. The Court rejected this contention, saying:

> "If deductions were made when bought above par, additions should be made when purchased below par. Such a rule would be as burdensome in the administration of the law as tracing dividends to their source, and was plainly not contemplated by the statute which declares that all interest on bonds should be income."

While this decision deals only with a construction of the statute, that construction and the reason given for it perforce imply an affirmance in the legislature of the power to enact tax legislation proceeding thus upon *general rules* of statutory declaration. The statute exemplifies the power of the legislature to prescribe such general rules or general classifications in order to *secure practicability of administration*, and notwithstanding that in particular cases technical accuracy or equality in the imposition of the tax may not be attained thereunder.

The same principle enters into the decisions here in

Anderson vs. Forty-Two Broadway Co., 229 U. S. 69;

Von Baumbach vs. Sargent Land Co., 242 U. S. 503;

Stanton vs. Baltic Mining Co., 240 U. S. 103.

That the expenses of the conduct of a business are occasioned by and attributable to all intermediate steps from initial outlay to final result is a simple proposition of common knowledge. Obviously the purpose of expenditure is the same at every step, whether in capital outlay or operation, ultimate gain. If any step of the process involving expense does not produce gain, ergo, it is unprofitable and must be eliminated. Hence, the science of cost accounting now applied in all larger industrial and commercial institutions. While courts in this country have had little occasion to consider the assignment of the gains and profits of business, costs accountants are thoroughly familiar with the subject. We venture to assert that there is no recognized or accepted system of cost accounting which goes upon the theory that capital invested and manufacturing processes are not to be accredited with a share of the profits of the business. When proper cost accounting shows that the manufacturing end of a business is conducted without profit, then the concern, if it be managed

with ordinary business prudence, will go out of that branch of the business.

The apportionment fraction prescribed in Sec. 1770b is based upon these principles. It is certainly more logical and less arbitrary than the apportionment adopted and advocated here by the plaintiff which ascribes or assigns to the plaintiff's business in this state profits only upon the basis of goods sold and thus assigns as income from sources within the state an amount considerably less than six per cent of the plaintiff's actual investment there and which, in case all products were sold without the state, would assign nothing either to the investment or to the manufacturing department of the business.

The apportionment rule prescribed in the Wisconsin Income Tax Law is less arbitrary, if indeed it can be said to be at all arbitrary, than the apportionment of property for taxation approved in

Maine vs. Grand Trunk Ry. Co., 142 U. S. 217;
Wisconsin & Mich. Ry. Co. vs. Powers, 191 U. S. 379;
Delaware Ry. Tax Case, 18 Wall. 206, 231-232;
St. Louis & S. W. Ry. Co. vs. Arkansas, 235 U. S. 350, 365;
Kansas City, etc., R. Co. vs. Botkin, 240 U. S. 227, 232;
Kansas City M. & B. R. Co. vs. Stiles, 242 U. S. 111, 119.
Adams Express Co. vs. Ohio, 165 U. S. 194.

IV.

THE TAX BEING UPON A SUBJECT MATTER WITHIN THE JURISDICTION OF THE STATE, IT IS NO OBJECTION THAT THE MEASURE OF IT MAY INCLUDE REFERENCE TO SUBJECT MATTER NOT TAXABLE BY THE STATE.

As we have pointed out, here the tax is upon a domestic corporation on its income, both corporation and income being within the jurisdiction of the state. The tax is upon income derived from a business as a whole, which business is conducted substantially within the state and is only upon income from a part of the business, fairly apportioned, which constitutes a source of income within the state and within its jurisdiction. The requisites of a valid tax, jurisdiction and constitutional utterance (*Loan Association vs. Topeka*, 20 Wall. 655), are therefore satisfied. If in measuring such a tax there be reference to income or receipts, in the making of the plaintiff's report or in arriving at the taxable income or the tax, such as gross receipts from interstate sales or the like, which may not be taxed by the state, this is no objection to the tax.

It is well established by many decisions here that a government having jurisdiction may, in imposing a lawful tax, *measure* the tax by reference to subject matter which itself would be non-taxable.

Flint vs. Stone-Tracy Co., 220 U. S. 107, 162, 165;
Baltic Mining Co. vs. Mass., 231 U. S. 68;
Wis. & Mich. Ry. Co. vs. Powers, 191 U. S. 379;
Horn Silver Mining Co. vs. New York, 143 U. S. 305, 317-18;
Adams Express Co. vs. Ohio, 165 U. S. 194;
Cleveland, etc., Ry. Co. vs. Bachus, 154 U. S. 438; Affirming 133 Ind. 609;
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217;
Delaware Railroad Tax Case, 18 Wall. 206, 231-232;
Kansas City, etc., R. Co. vs. Botkin, 240 U. S. 227, 232, 235;
Kansas City, M. B. & R. Co. vs. Stiles, 242 U. S. 111, 119-120.

It was contended here, in *Flint vs. Stone-Tracy Co.*

supra, that the Federal Corporation Tax was invalid as a tax upon the income of corporations derived from state and municipal bonds not subject to taxation by the Federal Government. That objection was overruled on the principle above stated, this Court holding that the tax was not on such income but on the privilege of doing business in interstate commerce as a corporation, *measured on such income*. Of the objection mentioned the Court said:

> "But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed." (220 U. S. 162.)

The Court distinguished *Galveston, etc., Ry. Co. vs. Texas*, 210 U. S. 217, and *Western Union Tel. Co. vs. Kan.*, 216 U. S. 1, leading cases cited on plaintiff's brief here, and reviewing other cases, said, speaking through Mr. Justice Day: (Italics ours.)

> "It is therefore well settled by the decisions of this Court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, *it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable.*" (p. 165.)

The decision in the *Baltic Mining Co. case, supra*, is stated in the syllabus paragraph thus:

> "While interstate commerce itself cannot be taxed, the receipts or property or capital employed therein may be taken as a measure of a lawful state tax." (231 U. S. 68.)

And in this case also this Court distinguished several of the cases relied upon by the plaintiff here and, upon a review of the prior decisions, said: (Italics ours.)

> "The examination of the previous decisions in this Court shows that they have been decided upon the application to the *facts of each case* of the principles which we have undertaken to state, and a tax has only been invalidated where its *necessary effect* was to bur-

den interstate commerce or to tax property beyond the jurisdiction of the state." (p. 86.)

And further:

"The conclusion, therefore, that the authorized capital is only used as the *measure of a tax*, in itself lawful, without the *necessary* effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a *measure of taxation*, and, as we have seen, *such measure may be found in property or in the receipts from property not in themselves taxable.*" (p. 87.)

What is said by the Court in the *Horn Silver Mining Co. Case, supra*, is equally applicable here:

"The *extent* of the tax is a *matter purely of state regulation*, and any interference with it is beyond the jurisdiction of this Court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax *is not levied upon articles imported, nor is there any impediment to their importation.* The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company." (pp. 317-318.)

In *Maine vs. Grand Trunk Ry. Co., supra*, the Court quoted the following statement of the principle from its prior decision in *Home Insurance Co. vs. New York*, 134 U. S. 594: (Italics ours.)

"The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.*" (142 U. S. 230.)

The principle is abundantly exemplified and illustrated in the cases cited and is clearly applicable.

V.

THE TAX IS NOT ON INTERSTATE COMMERCE OR ON ANY COMMERCE AND TOUCHES COMMERCE, IF AT ALL, ONLY REMOTELY AND INCIDENTLY AND IN NO MANNER IN CONTRAVENTION OF THE COMMERCE CLAUSE.

The property in this state as a source of income or contributing factor in the production of income is clearly not commerce of any kind; nor is plaintiff's manufacturing business, which again we contend is a principal factor in the production of its income and a source of income within the state, commerce.

U. S. vs. E. C. Knight Co., 156 U. S. 1;
Vaccie vs. Moor, 14 How. 568, 574;
Diamond Glue Co. vs. U. S. Glue Co., 103 Fed. 838;
N. Y. Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495.

As already pointed out the Wisconsin income tax is not a tax upon gross receipts but only a tax upon that gain or profit which the taxpayer has received and which is computed and determined as the net result of his business at the end of the year. It is not therefore, we submit, directly upon commerce at all, either state or interstate. It is not, as license taxes and the like, imposed as a condition of the right to engage in business in the state, either state or interstate. As is often said, where questions like these are raised, each case must stand on its own facts. Where, as here, the state has sought to, and has substantially, at least, avoided imposing its tax on interstate commerce or on subjects without its jurisdiction, every intendment is in favor of constitutionality and the law will be sustained.

We do not find a case in which this Court has passed upon this question under a general state income tax, but the principles and distinctions which the Court has made in sustaining against similar objection state privilege taxes, occupation taxes and property taxes should be at least equally applicable to sustain the tax here, for, obviously, and as already pointed out, this tax is not open to some at least of the objections that apply to occupation taxes, as, for instance, where they are made a condition of the right to do business, or license or franchising taxes as, for instance, where they are upon the business of interstate carriers and are a percentage of the carrier gross revenues, or the like.

To hold that the tax here is one upon interstate commerce or unlawfully burdens interstate commerce, because the net income upon which it is laid is derived from a business in which the produce is sold in interstate commerce, would be no more logical than to hold that the goods of a resident may not be subjected to personal property taxation in the state if, at any time in the past, they had ever been brought into the state in interstate commerce. Residents of the state will be no more deterred from prosecuting their business involving interstate transactions by a tax laid upon their net income, computed at the end of the year's business and paid the next year or the year following, than they would be, from buying and importing goods, by the knowledge that thereafter, when the goods should emerge from interstate commerce and from the package of importation, they would be subject to personal property taxation in the state.

A state tax imposed upon a taxable subject within the jurisdiction of the state to tax, which, as the tax here, touches interstate commerce only incidently and remotely, is not repugnant to the commerce clause.

Kansas City, etc., R. Co. vs. Botkin, 240 U. S. 227, 232-235;

St. Louis & S. W. R. Co. vs. Arkansas, 235 U. S. 350, 365;
Kansas City M. & B. R. Co. vs. Stiles, 242 U. S. 111, 119.
Ficklen vs. Taxing District of Shelby Co., 145 U. S. 1;
Wiggins Ferry Co. vs. E. St. Louis, 107 U. S. 365;
Western Union Tel. Co. vs. Massachusetts, 125 U. S. 530, 550;
Pullman Palace Car Co. vs. Penn., 141 U. S. 18;
Maine vs. Grand Trunk R. Co., 142 U. S. 217;
United States Express Co. vs. Minnesota, 223 U. S. 335, 342;
Gloucester Ferry Co. vs. Penn., 114 U. S. 196.

As was said here in *Kansas City M. & B. R. Co. vs. Stiles, supra:*

> "The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character." (242 U. S. 119.)

The case of *Kansas City, etc., R. Co. vs. Botkin, supra,* contains so much that is apposite, and the conclusion as reached, as it seems to us, is so entirely applicable that we feel warranted in quoting the following from the opinion: (Italics ours.)

> "The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power. Thus, in *Society for Savings vs. Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested

in Federal securities; and in *Home Ins. Co. vs. New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint vs. Stone-Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the state is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware R. Tax*, 18 Wall. 206, 231, 232; *State R. Tax Cases*, 92 U. S. 575, 603; *Philadelphia & S. Mail S. S. Co. vs. Pennsylvania*, 122 U. S. 326, 336, 344; *Ashley vs. Ryan*, 153 U. S. 436; *New York ex rel. Cornell S. B. Co. vs. Sohmer*, 235 U. S. 549, 559, 560. And, agreeably to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Min. Co. vs. Massachusetts*, 231 U. S. 68, 83) to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.

* * *

On the other hand, in *United States Exp. Co. vs. Minnesota*, 223 U. S. 335, 346, it appeared that the reference to gross receipts was only intended fairly to measure a tax upon a subject within the taxing power of the state, and the tax was sustained. And, in the case of *Baltic Min. Co. vs. Massachusetts, supra*, where a tax on foreign corporations was measured by the au-

thorized capital stock and was limited to $2,000, the Court also reached the conclusion 'that the authorized capital is only used as a measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce,' and that hence the legislation was within the authority of the state. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporation before the Court were 'sold and shipped in interstate commerce,' and that to that extent they were 'engaged in the business of carrying on interstate commerce,' and were 'entitled to the protection of the Federal constitution against laws burdening commerce of that character.' It was because the tax, although measured by authorized capital stock, could not, in view of its limitations, be regarded as imposing a direct burden upon interstate commerce, that the tax was upheld. 231 U. S. pp. 86, 87.

In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce, either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax,—on the privilege granted by the state of being a corporation,—and while it is graduated according to the amount of paid-up capital stock, the maximum charge is $2,500 in the case of all corporations having a paid-up capital of $5,000,000 or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce." (240 U. S. 232-233, 234-235.)

In *St. Louis & S. W. R. Co. vs. Arkansas, supra*, the Court states the following summary of established principles:

"So in *Atlantic & P. Teleg. Co. vs. Philadelphia*, 190 U. S. 160, the Court, reviewing numerous previous cases, laid down certain propositions as well-estab-

lished, and among them the following: (a) No state can compel a party, individual, or corporation, to pay for the privilege of engaging in interstate commerce; (b) this immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (c) the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States." (235 U. S. 365.)

In *Wiggins Ferry Co. vs. East St. Louis*, 107 U. S. 365, the Court said: (Italics ours.)

"The levying of a tax upon vessels or other watercraft or the exaction of a license fee by the state within which the property subject to the exaction has its SITUS, is not a regulation of commerce within the meaning of the Constitution of the United States. *Gibbons vs. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Morgan vs. Parham*, 16 Wall. 471. In *Gibbons vs. Ogden* it was settled that the clause of the constitution conferring on Congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to Congress to regulate commerce. In all of the cases just cited the right of a State to tax a ship owned by one of her citizens and having its SITUS within the state, although used in foreign commerce or in commerce between the states, was distinctly recognized. Thus, in *Passenger Cases* it was said by Mr. Justice McLean: 'A state cannot regulate foreign commerce, *but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A state may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property in some degree affects its use*'."

In *Western Union Telegrah Company vs. Massachusetts*, 125 U. S. 530, the Court, at page 550, said: (Italics ours.)

"It is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. *It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property.* Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

In *Pullman's Palace Car Co. vs. Pennsylvania*, 141 U. S. 18, the Court held:

"A statute of a state, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state, engaged in running railroad cars into, through and out of the state, and having at all times a large number of such cars within the state, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in this and other states over which its cars run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several states."

The holding in *Maine vs. Grand Trunk Railway Company*, 142 U. S. 217, is stated in the Syllabus thus: (Italics ours.)

Held—"A state statute which requires every corporation, person or association operating a railroad with-

in the state to *pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the state,* or to one operated as a part of a line or system extending beyond the state, *the tax shall be equal to the proportion of the gross receipts* in the state, to be ascertained in the manner provided by the statute, *does not conflict with the constitution of the United States;* and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the state, is one within the power of the state to levy."

In *United States Express Co. vs. Minnesota,* 223 U. S. 335, the State of Minnesota sought to collect a tax measured on the gross receipts of the Express Company in interstate business. This Court, in sustaining the law, at page 342, said:

"It is thoroughly well settled in this Court that state laws may not burden interstate commerce. As one form of burden may exist in taxing the conduct of interstate commerce, such taxation has been uniformly condemned. Examples of cases of that character may be found in, etc. (Citing cases.)

"While we have no disposition to detract from the authority of these decisions, *this Court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce.*"

"In *Maine vs. Grand Trunk Ry. Co.,* 142 U. S. 217, this Court sustained a tax which required every railroad operated within the state to pay an annual tax for the privilege of exercising its franchises therein, *determined upon a proportion of gross transportation receipts, which in that case were shown to be those of a railroad partly within and partly without the state, such gross receipts being derived from its entire business, state and interstate.* The resort to the gross re-

ceipts, in the opinion of the court, was merely a means of ascertaining the business done by the corporation, and thus measuring the tax, which was held to be within the power of the state.

"In *Wisconsin & Michigan Railway Co. vs. Powers*, 191 U. S. 379, a tax was sustained which made the income of the railway company within the state, including interstate earnings, the prima facie measure of the value of the property within the state for the purpose of taxation. In the course of the opinion this Court said (p. 387):

"In form the tax is a tax on 'the property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in *Maine vs. Grand Trunk Railway Co.*, 142 U. S. 217.
* * *

"The right of the state to tax property, although it is used in interstate commerce, is thoroughly well settled. *Postal Telegraph Co. vs. Adams*, 155 U. S. 688; *Pullman's Palace Car Co. vs. Pennsylvania*, 141 U. S. 18; *Ficklen vs. Shelby County*, 145 U. S. 1, 22. The difficulty has been and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such."

The statute of Massachusetts in *Baltic Mining Co. vs. Massachusetts*, 231 U. S. 68, required that every foreign corporation pay a tax of 1/50th of one per cent of the par value of its authorized capital stock. The *Baltic Mining Company*, a Michigan corporation, objected to this provision of the statute. This court, at page 82, said (italics ours):

"The specific objections of the plaintiffs in error to the imposition of this tax under the facts shown in the records are threefold: First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the

due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the Commonwealth of Massachusetts; and third, the tax denies to the plaintiffs in error the equal protection of the law.

"It is well settled and requires no review of the decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the Federal Constitution and that the States may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the State by the Constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. (Citing cases.)

"While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. *The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. United States Express Co. vs. Minnesota*, 223 U. S. 335, 344. *It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it.* A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained." (Citing cases.)

The case at bar is well within the precedent of *Ficklen vs. Taxing District, supra*, in which the Court distinguished the earlier case of *Robbins vs. Shelby Taxing District*, 120 U. S. 489, so much relied upon by the plaintiff here, saying:

"In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

The language of the Court's opinion in the *Ficklen Case* is precisely in point and more than embraces the case at bar (italics ours):

"No doubt can be entertained of the right of a state Legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a *resident citizen engages in general business* subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially, in negotiating sales between resident and non-resident merchants of goods situated in another state does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

* * * * *

"In *Philadelphia S. SS. Co. vs. Pennsylvania*, 122 U. S. 326, 345, Mr. Justice Bradley, speaking for the court, said: 'The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.' And this of course is equally true of the property, the business, and the income of individual citizens of a State. *It is well settled that a State has power to tax all property having a situs within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the State.*

* * * * *

"Again, in *Maine vs. Grand Trunk R. Co.*, 142 U. S. 217, we decided that a state statute which required every corporation, person, or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that when applied to a railroad lying partly within and partly without a State, or to one operated as a part of a line or system extending beyond the State, the tax should be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute,

did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia & S. S. Co. vs. Pennsylvania,* where the specific gross receipts for transportation were taxed as such, taxed 'not only because they are money, or its value, *but because they were received for transportation.*'

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why *a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce.*

We presume it would not be doubted that if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection, but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been."

Ficklen vs. Shelby County, supra, we think is clearly decisive of the case at bar. It certainly is more in point than any case cited by plaintiff. In that case certain commercial brokers took out licenses for their said business for the year 1887 under the provisions of the Tennessee statute imposing a tax upon brokers, buyers and sellers doing business within the state, measured, if no capital be invested, upon the gross yearly commissions, charges or compensa-

tion for said business. During the year the sales negotiated by Ficklen were made in behalf of persons residing in other states, and the goods so sold by him were shipped to other states. The contention was made that this tax was void because it amounted to a burden upon or regulation of interstate commerce.

The tax there, as here, was upon the income. But this case is the stronger, for Ficken was engaged exclusively in a commercial business, merchandise brokerage, whereas merchandising is a minor part of the business of the plaintiff here. The tax there was on gross income, whilst here it is on the net only. The tax in the *Ficklen Case* was an occupation tax imposed by way of a license as a condition precedent to the right to carry on the business, whereas here the tax is general and its enforcement is left to the usual methods of recovery after the business has been all done and is not even due until the second year after the business year upon the income for which it is laid.

In view of the foregoing, we submit that the conclusion tersely stated in the opinion of the state court is in harmony with the decisions here and should commend itself to the approval of this Court. The state court said (italics ours):

> *"The laying and collecting of an income tax by a state imposes a burden on its citizens wholly unlike a tax upon their business or commerce. The tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts or the property employed in interstate commerce. In fact the tax deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of the commerce have been discharged and such net profits are merged in the assets of the corporation. * * * * We are of the opinion that the tax imposed by the income tax law of this state does not impose a burden on the business or property of plaintiff in any sense repugnant to its rights under the provision of the federal constitution confer-*

ring on Congress the right to regulate commerce between the states, and that the trial court erred in holding that the income tax imposed by the tax commission was excessive and in awarding recovery for the amount of such alleged excess with interest."

Which opinion, we submit, is correct and should be affirmed.

Respectfully submitted,

H. J. KILLILEA,

Attorney for Defendant in Error.

WALTER DREW,

Of Counsel.

UNITED STATES GLUE COMPANY v. TOWN OF OAK CREEK.

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

No. 222. Argued March 21, 1919.—Decided June 9, 1919.

A State, in laying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Constitution.

So *held* in respect of the Wisconsin income tax law (Laws 1911, c. 658), as applied to income from sales to customers outside the State of goods delivered from the company's factory within it, and from

sales to such customers and shipment from the company's branches in other States of goods previously made at its factory within the State and sent to such branches.

161 Wisconsin, 211, affirmed.

THE case is stated in the opinion.

Mr. George Lines, with whom *Mr. Willet M. Spooner* and *Mr. Louis Quarles* were on the briefs, for plaintiff in error, in support of the proposition that a tax on income of property or business is a tax upon the property or business itself, cited *Dobbins* v. *Erie County Comrs.*, 16 Pet. 435; *Collector* v. *Day*, 11 Wall. 113; *Weston* v. *Charleston*, 2 Pet. 449; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27.

The fact that the law is general and lays a tax upon income within the State's power will not justify the attempt by virtue of it to tax income which is not taxable by the State. *Crew Levick Co.* v. *Pennsylvania*, *supra*; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226; *Minnesota Rate Cases*, 230 U. S. 352; *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342; *American Express Co.* v. *Caldwell*, 244 U. S. 617; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

Mr. H. J. Killilea and *Mr. Walter Drew* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The judgment brought up by this writ of error was entered by the Circuit Court of Milwaukee County upon the mandate of the Supreme Court of the State of Wisconsin issued on reversal of a previous judgment of the circuit court in an action brought by plaintiff in error to recover the sum of $2,835.38, paid under protest as part of a tax assessed and levied by the taxing authorities of the State upon plaintiff's income for the year 1911, under c. 658, Wisconsin Laws 1911. The Supreme Court overruled plaintiff's contention that the portion of the tax that was in controversy, having been imposed upon income derived by plaintiff from interstate commerce, amounted to a burden upon that commerce, contravening the commerce clause of § 8 of Article 1 of the Constitution of the United States. 161 Wisconsin, 211. And this is the sole question presented for our consideration.

The act, which was passed under the authority of an amendment to the state constitution (*Income Tax Cases*, 148 Wisconsin, 456), imposes a tax upon incomes received during the year ending December 31, 1911, and annually thereafter; defines the term "income" as including (a) rent of real estate; (b) interest derived from money loaned or invested in notes, mortgages, bonds, or other evidences of debt; (c) wages, salaries, and the like; (d) dividends or profits derived from stock, or from the purchase and sale of property acquired within three years previous, or from any business whatever; (e) royalties derived from the possession or use of franchises or legalized privileges; and (f) all other income derived from any source, except such as is exempted. There is a provision, "That any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is

derived from business transacted and property located within the state," which is to be determined in a particular manner specified in § 1770b, as far as applicable.

Corporations are allowed to make certain deductions from gross income, including amounts paid for personal services of officers and employees and other ordinary expenses paid out of income in the maintenance and operation of business and property, including a reasonable allowance for depreciation, losses not compensated for by insurance or otherwise, taxes, etc. These need not be further mentioned, beyond saying that the intent and necessary effect of the act is to tax not gross receipts but net income; that from the stipulated facts it appears that the tax in question was imposed upon plaintiff's net income; and that this is in accord with the construction of the act adopted by the supreme court of the State in this and other cases. *State ex rel. Manitowoc Gas Co.* v. *Wisconsin Tax Commission*, 161 Wisconsin, 111, 116; *United States Glue Co.* v. *Oak Creek* (the present case), 161 Wisconsin, 211, 221; *State ex rel. Bundy* v. *Nygaard*, 163 Wisconsin, 307, 310.

In order to determine what part of the income of a corporation engaged in business within and without the State (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the State, reference is had to a formula prescribed by another statute [§ 1770b, subsec. 7, par. (e) of Wisconsin Statutes] for apportioning the capital stock of foreign corporations, under which the gross business in dollars of the corporation in the State, added to the value in dollars of its property in the State, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the State, added to the value in dollars of its property within and without the State. The resulting fraction is taken by the income tax law as representing the

proportion of the income which is deemed to be derived from business transacted and property located within the State. This formula was applied in apportioning plaintiff's net "business income" for the year 1911, and upon the portion thus attributed to the State, plus the income from rentals, stocks, bonds, etc., the tax in question was levied.

Plaintiff was and is a corporation organized under the laws of the State of Wisconsin, having its principal office and place of business in the Town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the State and in other States and foreign countries. Its net "business income" in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a) about $16,000 from goods sold to customers within the State and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the State and delivered from its factory; (c) about $31,000 from goods sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches in other States, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches without the State, these goods having been purchased by plaintiff outside of the State and shipped to plaintiff's factory in the State, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the State, the sales having been made and goods shipped from said branches, and the goods having been purchased by plaintiff outside of the State and shipped from the points of purchase to the branches without coming into the State of Wisconsin.

No contention was made as to the taxability of the income designated as item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the State was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce.

Stated concisely, the question is whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States.

It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. Thus, it was declared in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695-696: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right

to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." Again, in *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163, the court upon a review of numerous previous cases laid down certain propositions as established, among them these: (a) that the immunity of an individual or corporation engaged in interstate commerce from state regulation does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce; and (b) that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. See, also, *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 365.

Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves.

The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of

the Federal government." Many previous cases were referred to.

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in *Peck & Co.* v. *Lowe*, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and inci-

dental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.

And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business.

Judgment affirmed.

MR. CHIEF JUSTICE WHITE concurs in the result.